

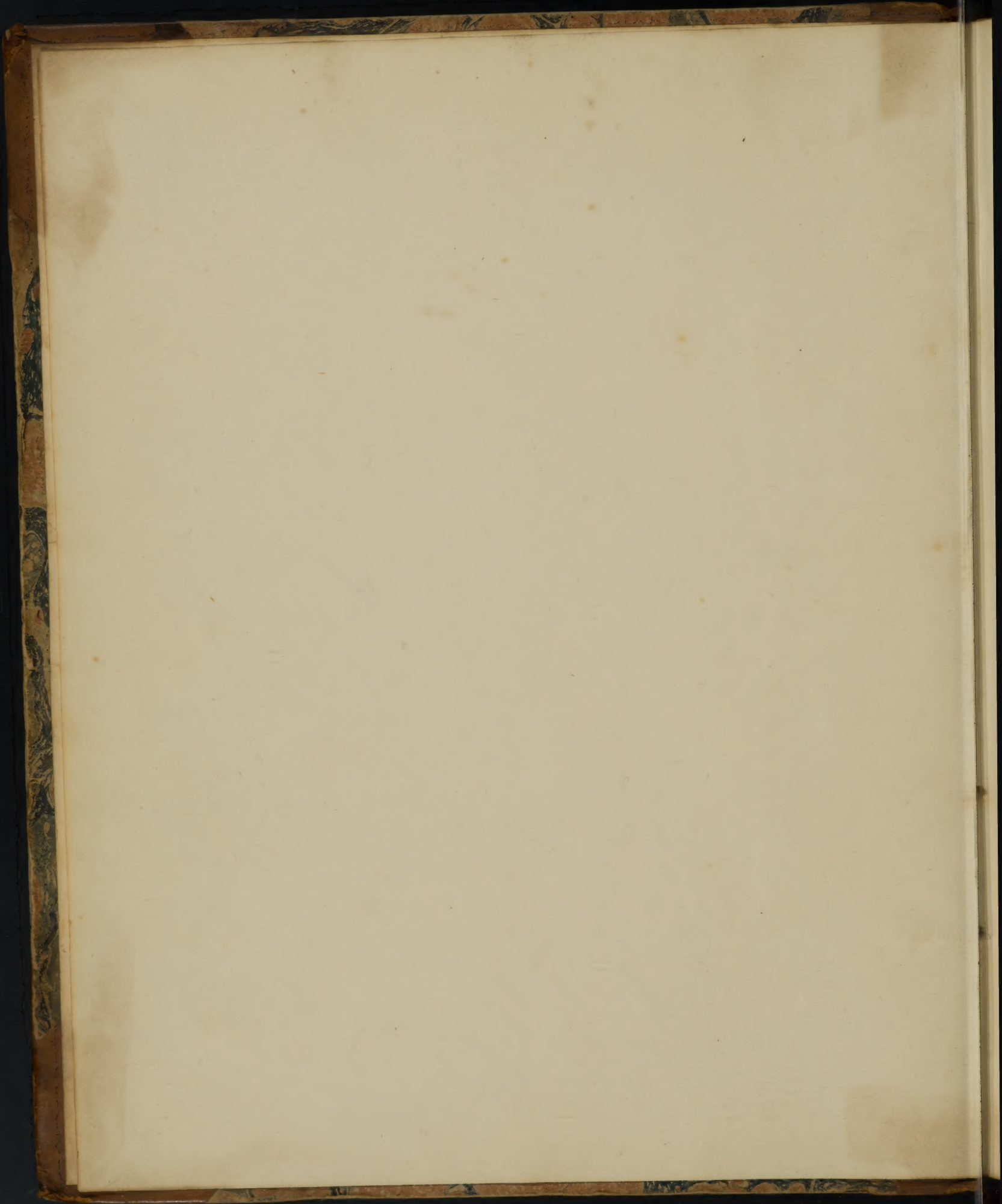


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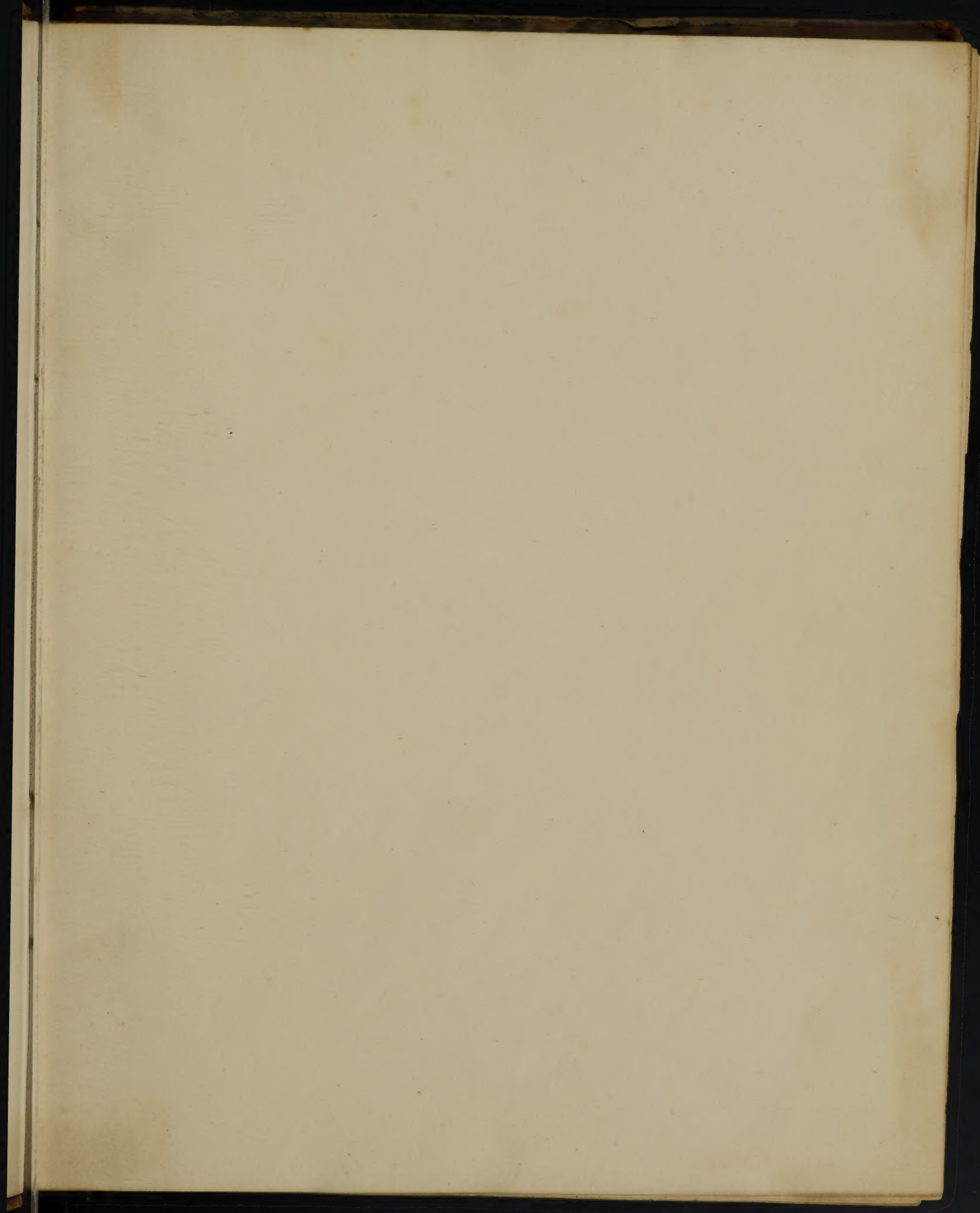


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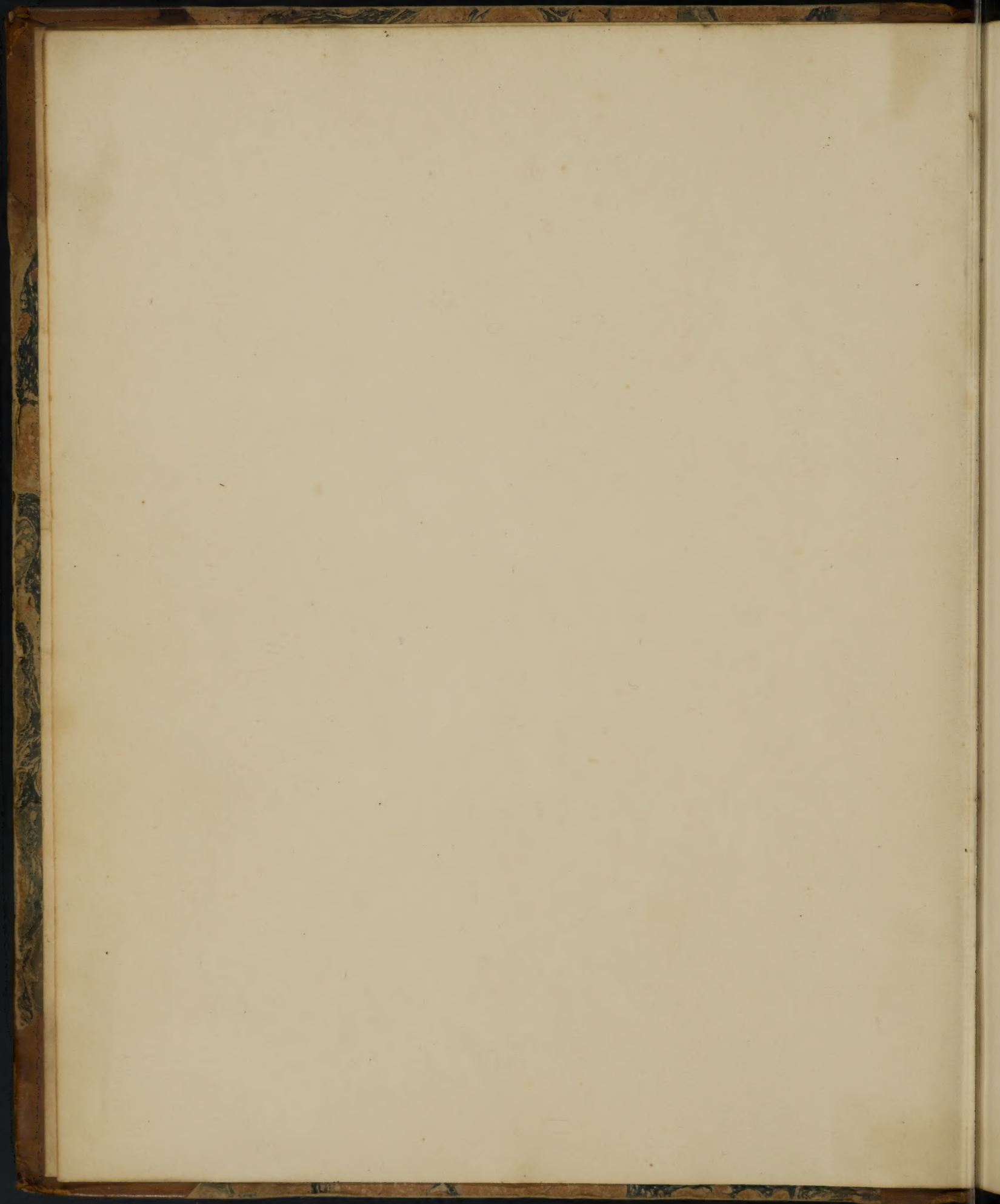




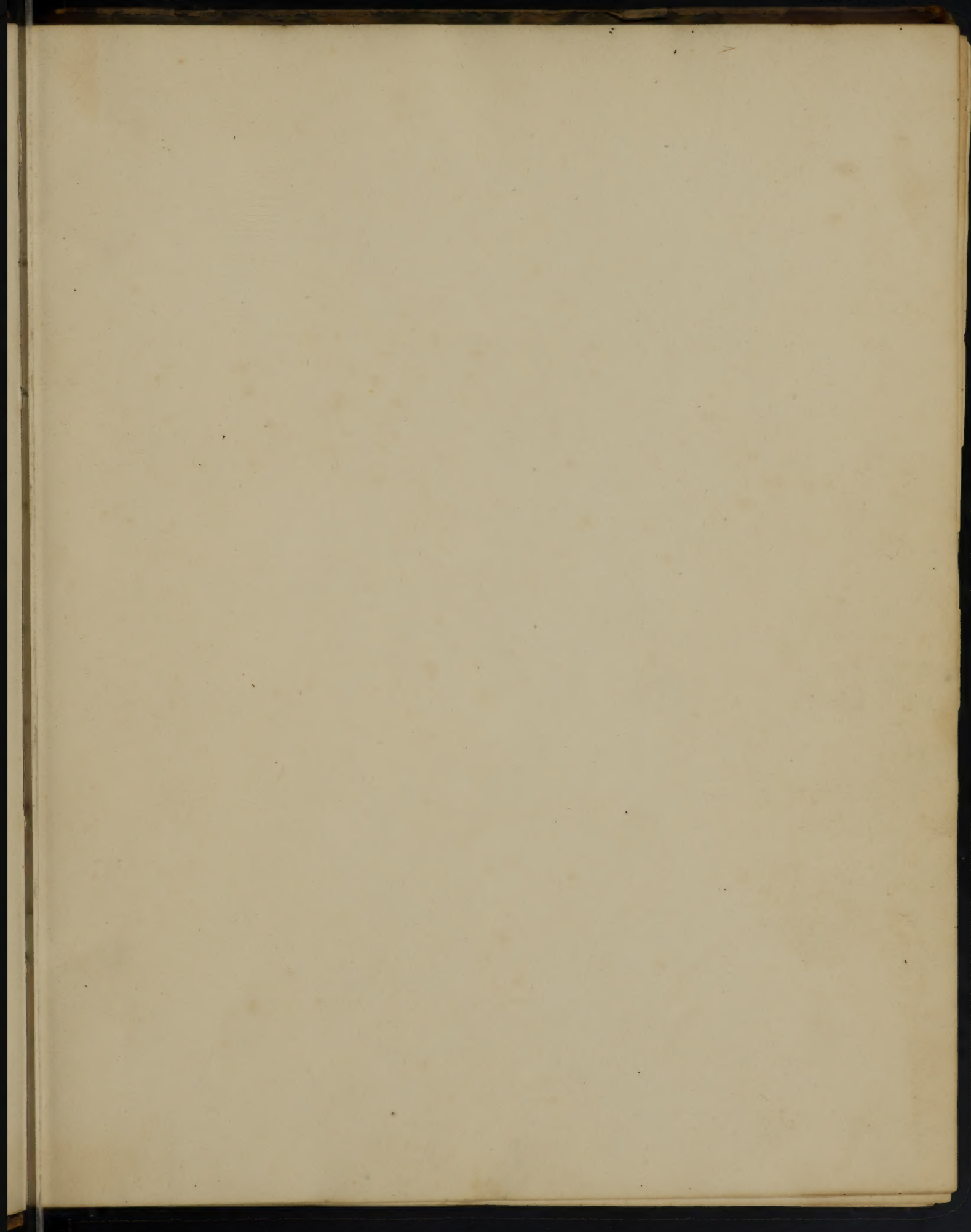




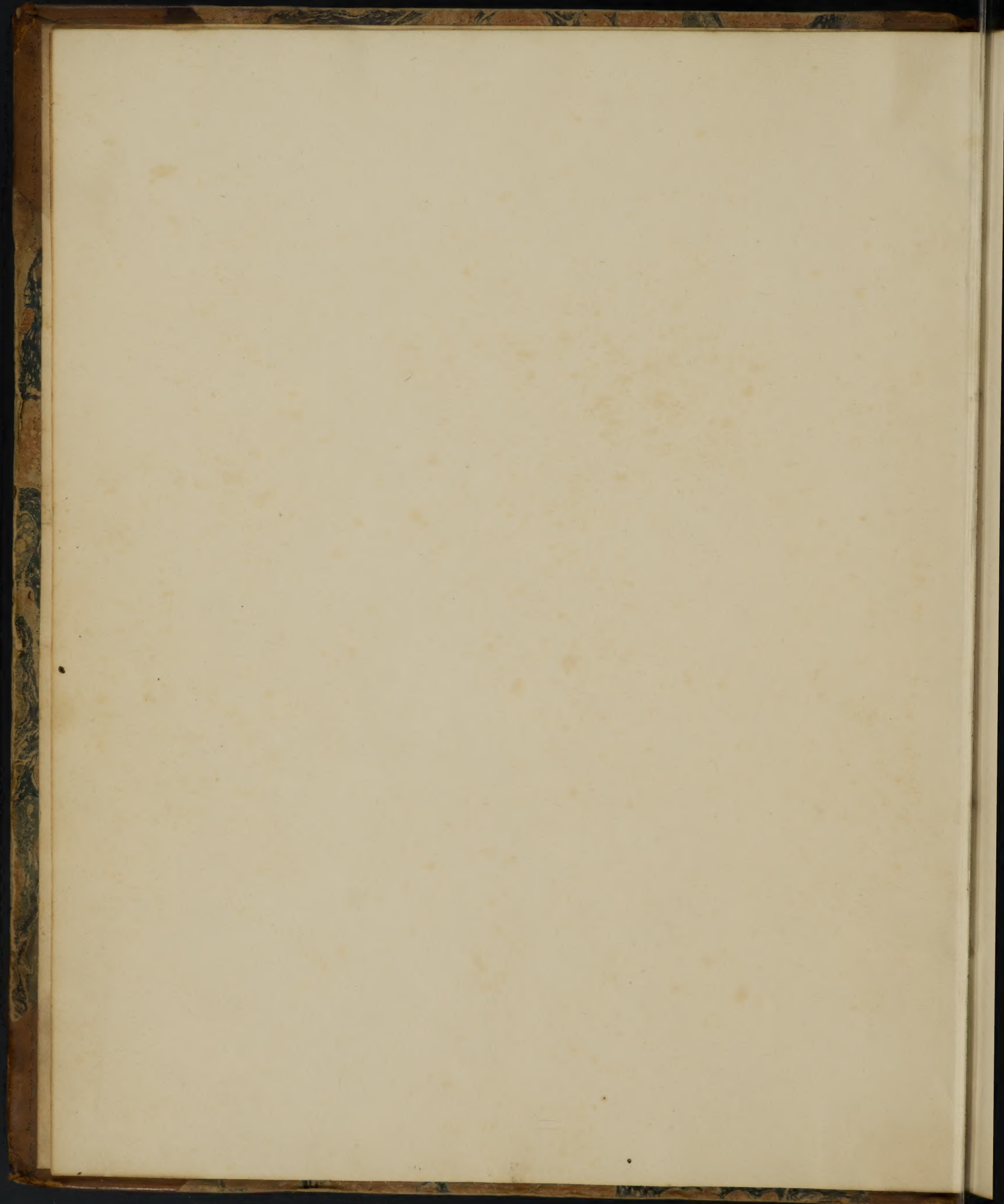




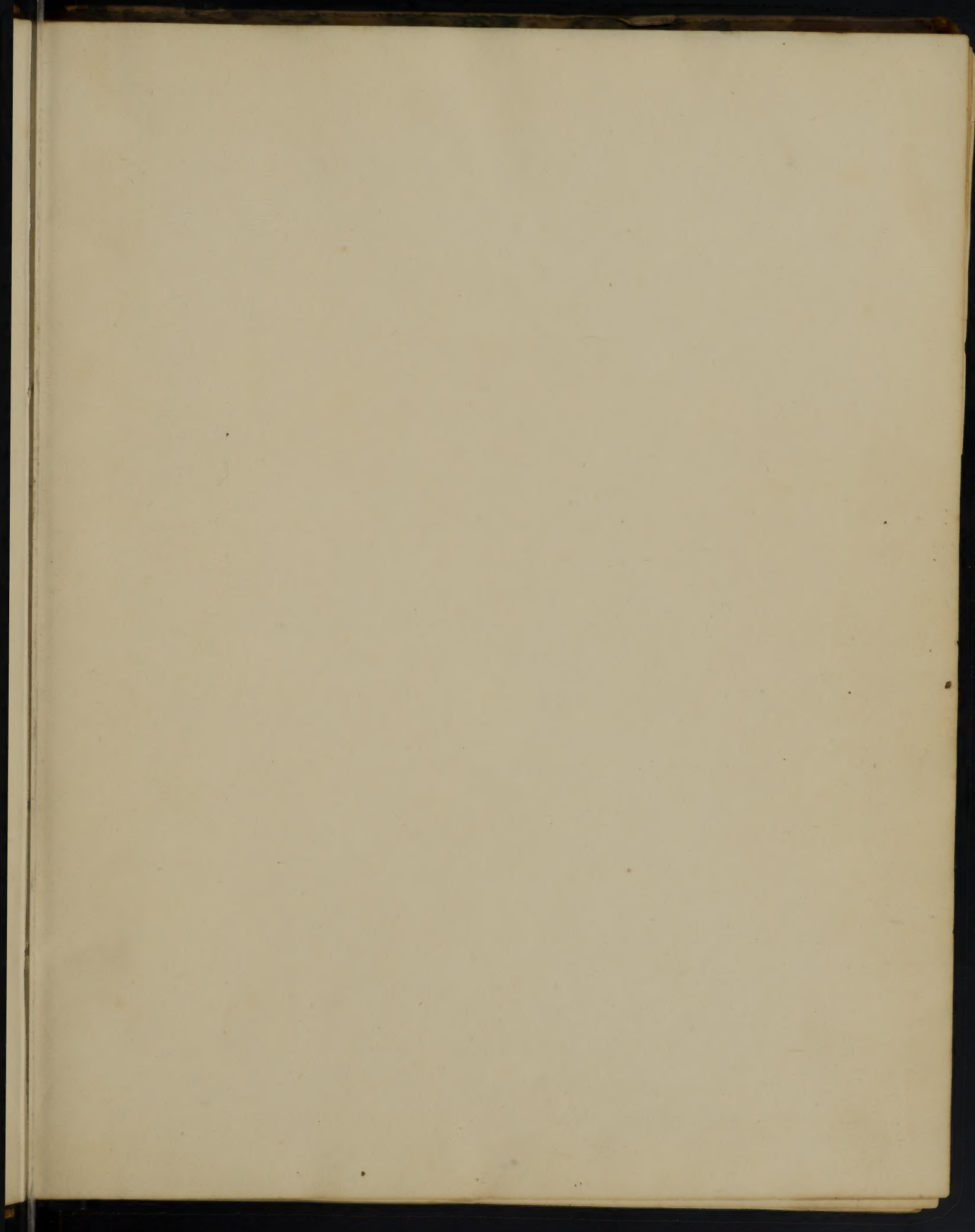




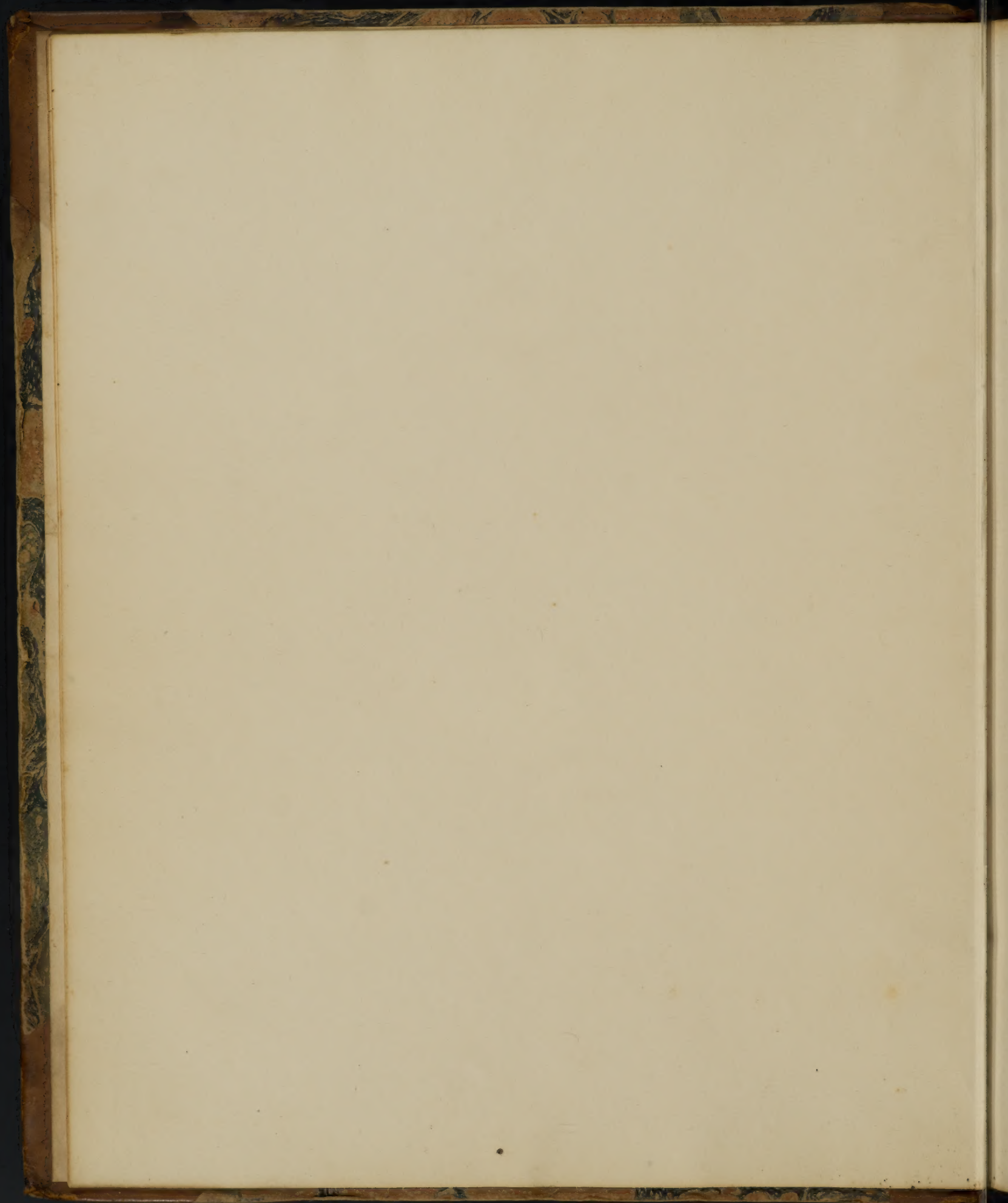


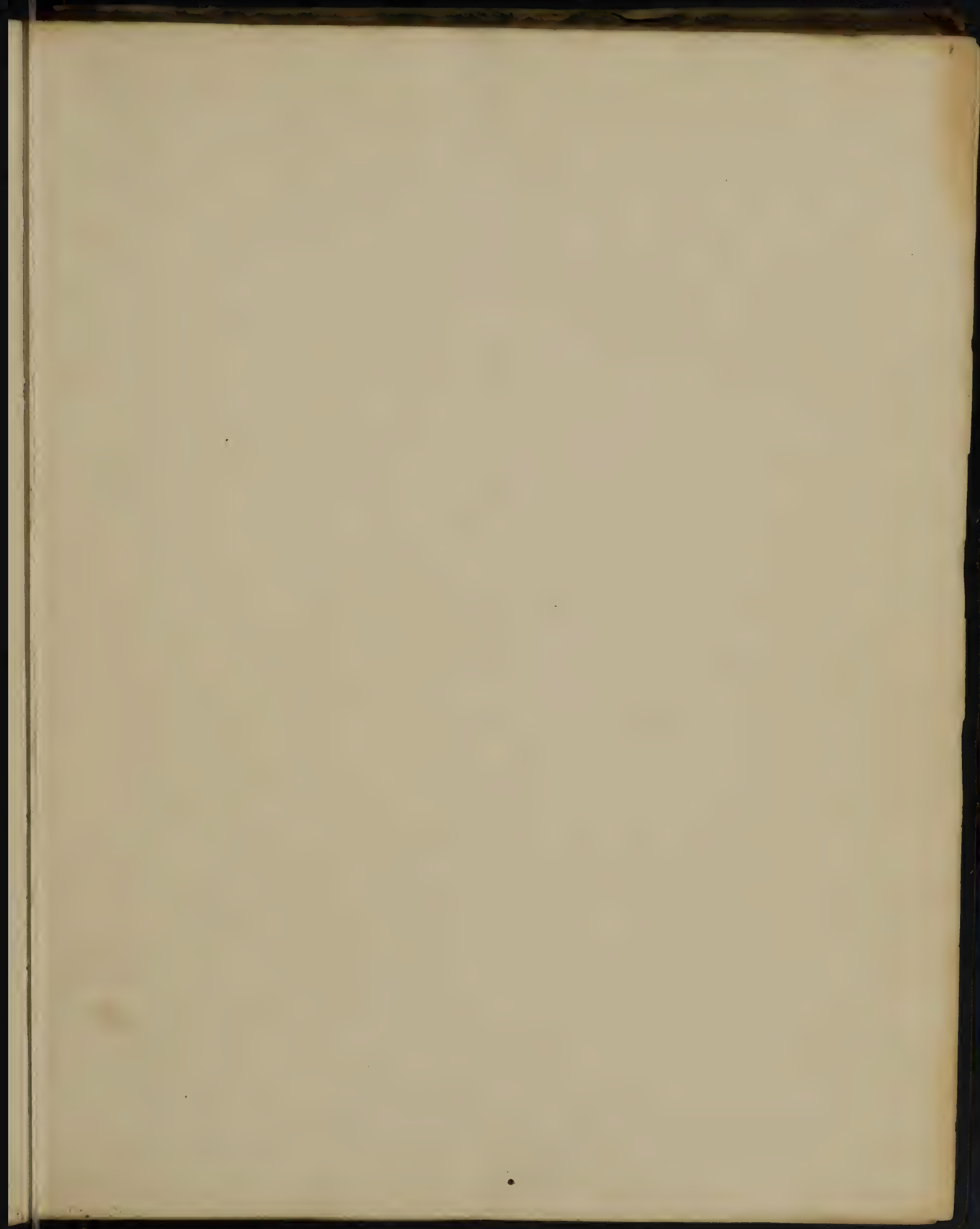




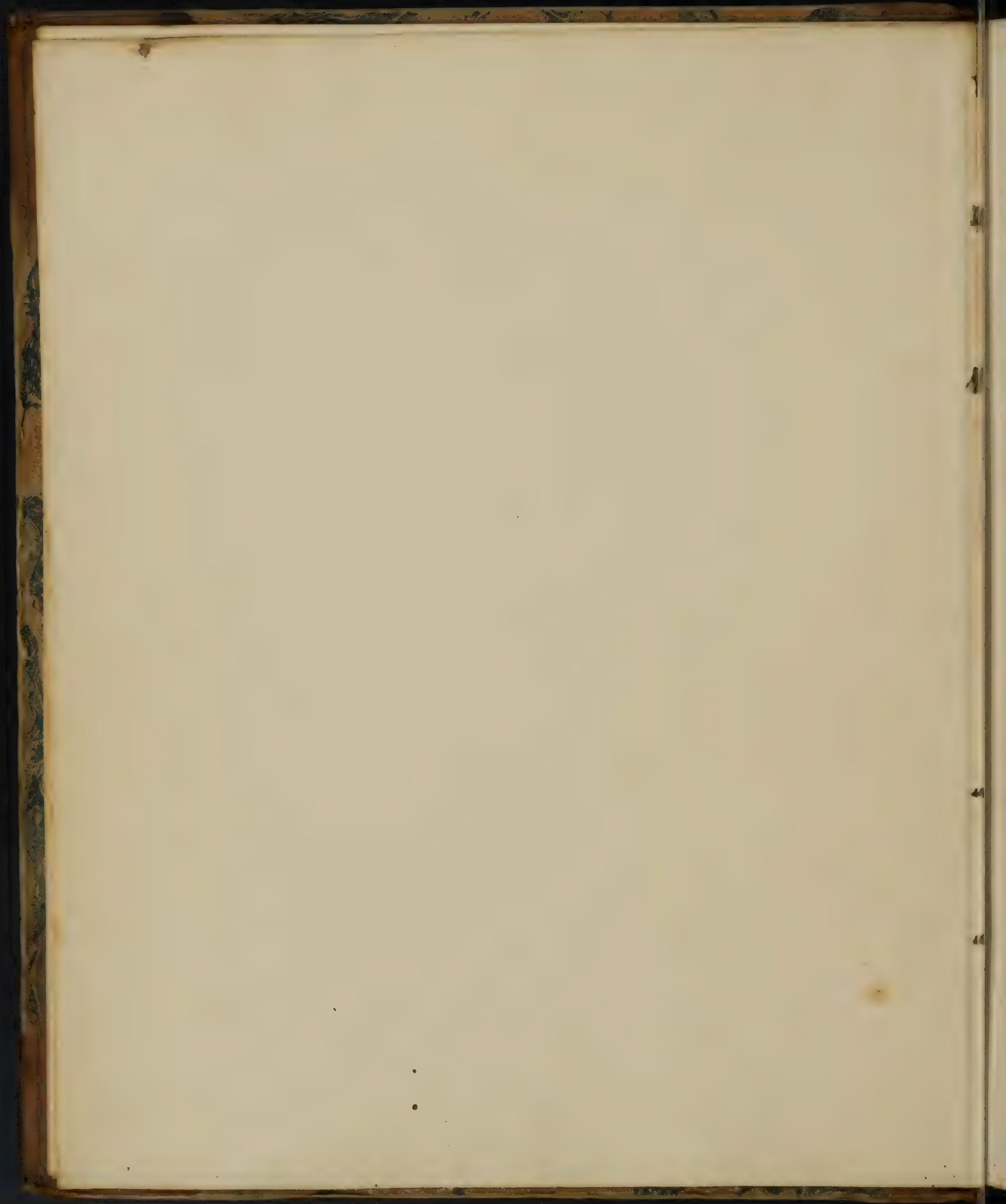


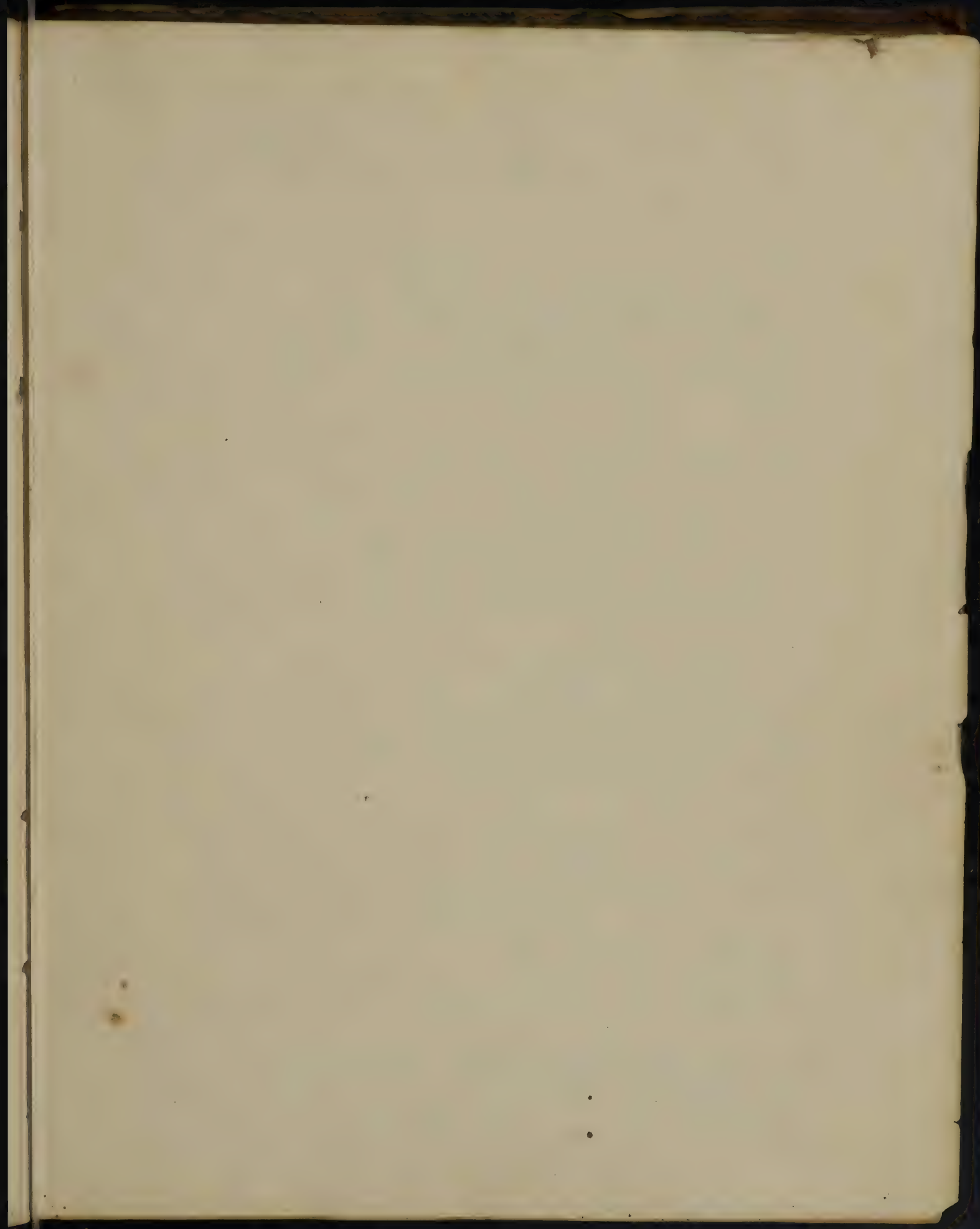




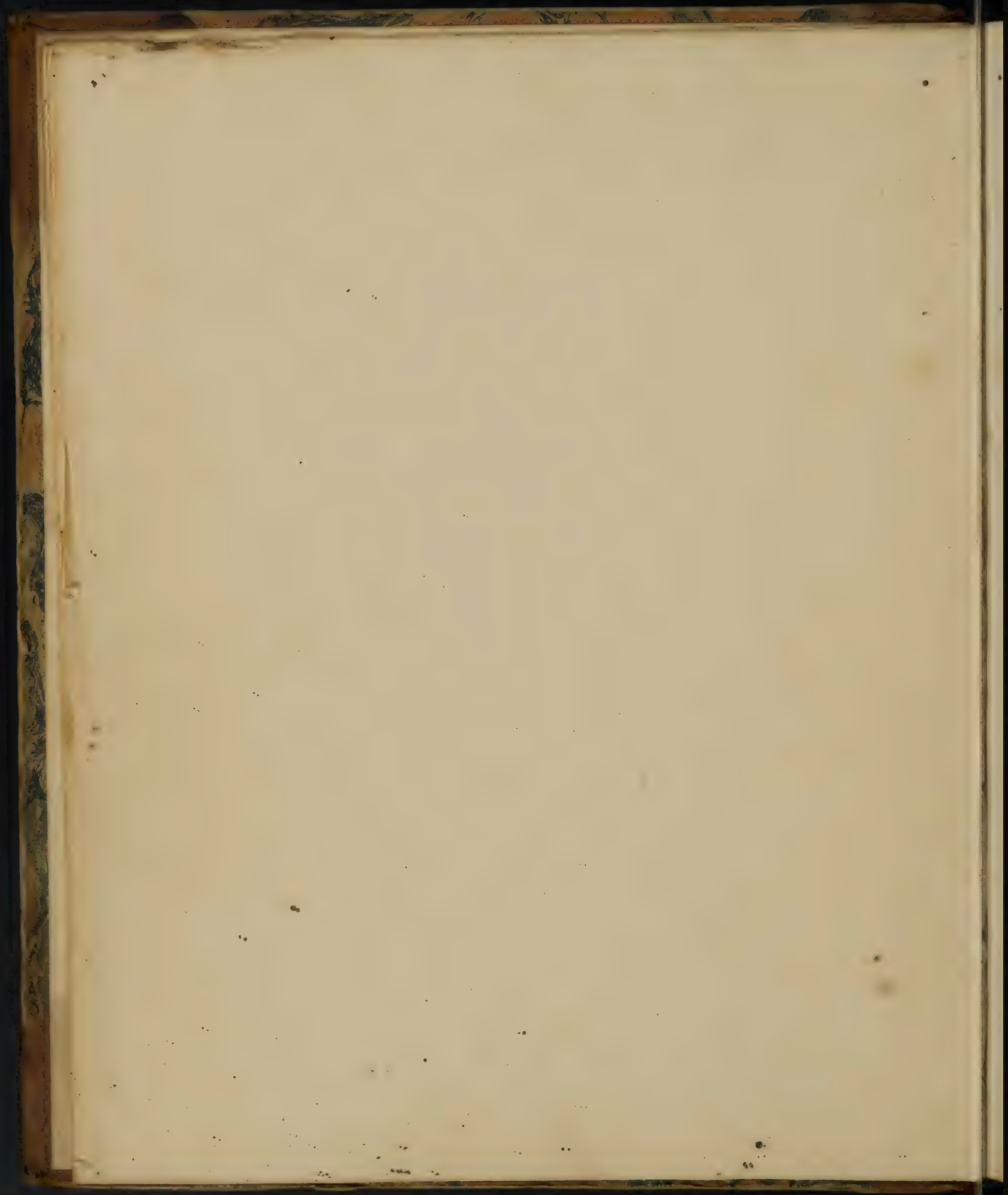












# Municipal Law

Municipal Law is defined to be a rule of civil conduct, prescribed by the supreme power of the state commanding what is right & prohibiting what is wrong. It is a rule of civil conduct regarding those rights which arise in civilized society.

This rule to correspond with the definition must be permanent uniform & universal. By permanent is not meant eternal or immutable, but that it is not occasional, that it is to continue for a certain or indefinite time until altered or repealed by the legislature.

By universal is not meant that it extends thro. the whole realm for there are local customs but surely that it is universal within its own limits that is general & not personal. 1 Bl. Com. 44.

The difference between natural & municipal law is, that the former is a rule of moral conduct the latter of civil. 1 Bl. 45.

It is called a rule in contradistinction to counsel or advice & to a compact or agreement.

The definition requires that the rule be prescribed, i.e. promulgated before it takes effect & so no law ought to be retroactive, yet in fact many



written laws are & retroactive law is not of course  
 ex post facto. It has however a retroactive to facts that  
 took place before it was made: an ex post facto  
 law is a general law of this description: so that the  
 former is a genus of which this latter is a species.  
 the general definition really prohibits both yet it  
 often happens that laws have a retroactive situa-  
 tion. you will find the above distinction well ex-  
 plained in 3 Dallas 386. 391. and it is unmat-  
 terial in this case by far our constitution prohibits  
 ex post facto laws.

This rule is prescribed by the supreme  
 power i.e. the legislative power. The power of making  
 laws which necessarily involves that of repealing them  
 is the highest power known among men and swallows  
 up all other powers. 1 Bl. 46. 90.

With regard to the rules  
 of interpretation I do not intend to dwell upon  
 them as I have formerly. as they are merely ele-  
 mentary I would refer you to Blackstone from whom  
 they may be so well & perhaps better learned. I shall  
 merely write them -

As to interpretation there are  
 certain rules intended to discover the intention of  
 the law maker. which intention when ascertained is  
 the law of the land.

The words of the laws are  
 generally to be understood according to their most  
 known, usual & proper signification.

This rule commences

itself to the understanding of every body. the popular meaning of a word is properly its true meaning. It ought always to be the practice to use words as the common people understand them, and then they will never be entrapped by the law.

Terms of art are to be understood according to their acceptation among the learned in that art. else often they could not be understood at all. Hence if the technical terms of the Law are used they are to be construed according to their technical & legal import. - Thus if the terms "a man & his heirs" or "a man & his assigns." we must go to the Law for a definition. - This rule is universal. 1 Bl. 59. 60. 4 Bac. 647. 6 Mod. 143. - The same rule applies to the construction of contracts. 1 Pow. Cont. 402.

2<sup>d</sup> Words when dubious are to be construed by reference to the context. - And upon the same principle it is useful & often necessary to refer to the preamble which is no part of the law. but as it shows the intention of the legislature and the objects of the law it is to be referred to. So it is often useful to compare the law with others upon the same subject. 1 Bl. 60. 1 Vy. 365. 3 P. Wms 185 4 Bac. 645. Plowd. 206.

3<sup>d</sup> Words are always to be understood as having reference to the subject matter of the rule. for there are many words in our language that have different significations according to the subjects to which they are applied. 1 Bl. 60.



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4<sup>th</sup> The effects and consequences of different constructions are to be regarded. This in one is plainly reasonable and equitable and the other clearly the reverse. the former is always to be preferred. 4 Bac. 652. 1 Mod. 344. 1 Bl. 61.

5<sup>th</sup> The last and that which is instar omnium is. that the spirit & reason of the law is to be consulted. This is the object to which all the other rules tend. indeed the reason & spirit of the law is the law itself, and, with an exception as to penal laws, is when discovered conclusive in all questions of construction. Plow. 232. 4 Bac. 647. 1 Bl. 61.

From this last great and cardinal rule arises what is called the equity of the law. the word equity is here used in its appropriate and not its usual sense it does not mean moral equity, but a construction agreeable to the reason & spirit of the law. Thus when it is said, that a case is within the equity of the law it is only meant that it is within its reason & spirit. 1 Inst. 24. b. 1 Bl. 62. 3 Bl. 431.

Municipal Law is divided into two branches which include the whole viz. scripta & non scripta i.e. the written & the unwritten law.

The unwritten law includes the Common Law properly so called or general customs, 2<sup>o</sup> particular customs, & 3<sup>o</sup> particular laws which are observed only in certain jurisdictions as particular courts.

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The unwritten law is founded in custom or general usage. 1 Bl. 63. 67.

The unwritten law is called unwritten because its original institution is not set down in writing, as acts of the legislature are, its authority is derived from long & immemorial usage, whence the memory of man runneth not to the contrary, and this is the foundation of all unwritten law. A statute is reduced to writing and the roll of the legislature is conclusive evidence, what that imports is never to be contradicted. 1 Bl. 64. 67.

The Common Law is nothing more than a general custom, or a rule of civil conduct founded in custom and extending over the whole realm. It is called common because of its extensive application not being confined to a particular district. 1 Bl. 67. 74

I would here

observe that Common Law & unwritten law are not synonymous the often confounded. the C.L. is a branch of the Unwritten law and it depends like all the other branches of it for its authority on immemorial usage or its universal reception from time immemorial, the Eng. position rule which regulates the extent of legal memory cannot apply to us. By C.L. it was good custom the time whence the memory of man runneth not to the contrary. But the Eng. rule is that legal memory extends back to the accession of Rich. I. in the 12<sup>th</sup> century, 1 Bl. 68. 2 Bl. 31. 2 Roll. 269. 2 Inst. 238. 9.

To one wholly unacquainted with the unwritten

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it would allow a necessary inquiry where is the C. L.  
to be found. It is not written originally, but it is to be  
found in the records of courts, books of reports and judicial  
decisions and in the treatises of the learned: and the law  
as thus found is to be ascertained and explained by  
the judges. 1 Bl. 63. 4. 69.

These records decisions &c are  
only evidence of what the law is, and are not the  
law itself. If they were they could not be altered or  
debarred from but by act of the legislature: we  
find however that decisions are occasionally  
overruled: so that they are only *prima facie*  
and not conclusive evidence. 1 Bl. 70.

c. l. / precedent

is a former decision upon the point in question and is  
therefore evidence & only evidence of what the law  
is.

With regard to the authority of precedents it is a  
general rule with lawyers that it is to be followed  
implicitly, unless it can be shown to be flatly  
absurd or unjust. A precedent is not to be  
overruled merely because the reason if it can-  
not be discovered, it is authoritative & binding  
unless shown to be unjust, and the onus probandi  
lies on him who would lay it aside. And indeed  
if it were not so we should have no known and  
established law: this rule is as absolutely indispen-  
sable as it is to yield obedience to the legislature. This  
is the present disposition of men thro' the country  
although different sentiments were entertained for a few

years immediately following the Revolution. 1 Bl.  
69. 70. 1 East. 498.

I observed that the C.L. is theoretically  
founded upon immemorial usage time out of mind.  
if this is the true description of the C.L. it may be  
asked, how did it commence? for it must have had a  
beginning & then it could not have existed from time  
immemorial. The truth is that it was built up by  
the courts of justice.

There must be an unwritten law  
in all countries for it is not possible for the written  
or statute law to reach all possible cases.

It would  
then be said that it is not prescribed by the supreme  
power and indeed the only way it can be said to be  
so prescribed, is that it has been acquiesced in by the  
supreme power. Indeed entire branches of the C.L.  
as the law of Executory devises have originated since  
the time of legal memory. So too the law Merchant.  
both these branches of the C.L. were as much unknown in  
the time of Rich. 1<sup>st</sup> as any of the modern discoveries  
in chemistry. this then is in reality a fictitious quality.  
These decisions merely promulgate the law they do not cre-  
ate it: they are only evidence of what the law always  
was & would have been declared to be had the question  
arisen in the time of Rich. 1<sup>st</sup>

The second branch of the  
unwritten law is what is called particular customs.  
these are distinguished from the C.L. only by being  
confined to local limits & not common to the whole



realm or state. they are defined to be local usages extending over particular districts. - as the custom of Gavelkind or Borough Eng. and are binding as far as they extend. 1 Bl. 74. 2 Bl. 263.

Of particular customs the courts do not regularly take notice as they are not presumed judicially to know them. they are therefore to be pleaded & proved like any other matter of fact & if their existence is denied it is to be tried by jury. Lit. sec. 265. Co. Lit. 175. 1 Bl. 76.

There is however an exception to this rule when any particular custom has been before determined & recorded in the same court in which the question arises. it need not be again proved for it already appears established by the records of the court. Doug. 365. 1 Bl. 76.

There is an other exception in the case of Gavelkind & Borough Eng. These customs are unknown to our law. the the land in most of the states of the Union are held in Gavelkind tenure as born. Of the existence of these two customs the courts take notice. so that to take advantage of them all that it is necessary to be proved is that the case comes within them. 1 Inst. 175. 1 Bl. 76.

It is remarkable that Blackstone classes the law merchant with particular customs. for it is in no one sense a particular custom nor has it a single trait of that class of laws. the law merchant extends thro the whole realm. it is

indeed confined to particular subjects but that does not constitute it a particular custom. the law of descents is confined to particular subjects & relates only to lands: the truth is that the law merchant is nothing more or less than a branch of the C.L. properly so called. 1 Bl. 75. cont. 2 Bl. 459. 461. 467. 1 Ray 175. Chit. B. 13. Com. 55. 152. 2 Vent. 295. 310.

And the law merchant is not followed by the incidents of a particular custom. it need not be specially pleaded, nor is it tried by jury: the court notices it *ex officio*. Salk. 128. It is said that if new cases arise in which it is doubtful it may be proved by witnesses & I have no doubt but that a local usage may be so proved, but this is not evidence to be offered to the jury to establish a matter of fact. it has been so used but I believe it contrary to principle. as to such particular customs the testimony of witnesses may be taken, but it is only to give information to the court as to the usage of merchants, who are from that to determine the law in the case. The merchants are here to be used by the judges like dictionaries. Chit. B. 28. 109. 2 Bur. 1216. 1218. 1222. 1 Bl. Rep. 298. Doug. 72. 3. 653. 4 T. Rep. 208.

As to the legitimacy of customs I can only refer you to a page or two in Blackstone. To be legal a custom must have seven requisites. see 1 Bl. 76 to 78. 1 Inst. 113. 114. 1 Roll. 565. 9 Co. 58.

Customs in derogation of the C.L. are to be construed strictly & can never be extended by construction. the case



must come literally within the custom to be affected by it. Thus by the custom of Gavelkind an infant can convey his land by Feoffment. but he cannot lease it, altho of much less consequence than to convey the fee.

1 Bl. 78.9

The third branch of the unwritten law consists of certain particular laws adopted by custom & used only in certain particular jurisdictions or courts. particular customs are confined to local limits, but particular laws are not. It is immaterial where the cause of action arose provided it is brought to one of these courts. Thus the civil & canon laws which are adopted by the maritime, ecclesiastical, military and university courts. 2 Bl. 67. 79 to 83.

It is the adoption of these laws from time immemorial that gives them all their authority. For they have no more intrinsic or inherent force in Eng. than the laws of the German Empire.

When the legislature of a country adopts a particular code it becomes part of the written law. but when it is adopted by the usage & custom of courts it is only unwritten. 1 Bl. 79. 80.

The common & statute law of Eng. as far as binding at all in this country, derive their authority from the same sanction viz adoption and immemorial usage. Having been so adopted our courts cannot reject them except so far as they can be shown to be flatly unjust absurd or inapplicable.

There are certain parts & indeed whole branches of the Eng. C.L. which cannot apply to us as those parts which have arisen from their monarchical form of government. So of those precedents that are plainly unjust the binding force of which has been very much lamented by the Eng. judges.

The true rule then is that the C.L. of Eng. is *prima facie* the law of our country, tho' all the states, some have adopted it by statute tho' all have not. And now since the C.L. has been adopted & acquired in it the people consider it as the preservation of their rights our judges cannot reject it. 1 Tuckey Bl. 411. 429.

Soon after the adoption of our constitution it was found that we had had a different rule of law from the Eng. law & the question was formally discussed whether we could have a common or unwritten law distinct from that of England. the objection to this unquestionable right was altogether technical & it was determined that it is competent for the courts of the several states to set up a common law of their own. It seems strange that this should ever have been doubted and it is well left for us to go into the argument. I would however just observe that there are two or three grounds on which it is demonstrable that we must have a common unwritten law of our own. As to those parts of the Eng. C.L. which are inapplicable to us we must have a substitute. further it is impossible for a united



to be provided in the simplest case without the assistance of unwritten law. the court would then have to adopt or make one. but this question is at an end.

II. The second general branch of municipal Law is the written Law, or the statute Law. this needs no definition and means only the Law as prescribed by the acts of the Legislature.

It has been a question in some parts of the Union how the Eng. stats. are binding here. I take the rule to be that the ancient Eng. stats. as they are called are binding here in the same sense as the unwritten Law of Eng. is. By the ancient Eng. stats. are meant those that existed at the time of the colonization of this country. The reason is that our ancestors brought over with them so much of the Eng. Law as were extant at that time. they considered them as their birth rights. & so did the Eng. jurists with respect to all their colonies. — Those Laws then are *prima facie* our Law. this is the principle which our jurists have adopted. — With respect to the B.L. a distinction between ancient & modern would be a solecism. a modern decision in derogation to some ancient rule of the B.L. does not make sense it only declares what the B.L. originally was. — I would not be understood as saying that our Legislatures are bound by the ancient stats. of Eng. doubtless they can alter

them when they please. but our courts are *prima facie* bound by them. see this subject well treated in 1 Tuck. Bl. 380. 384. 391. 393. 1 Bl. 106 108. Salk 411. 666. 2 P. W. 75. Pow. Ser. 52. Kirk 369.

I will sum up the whole thus. The ancient statute law of Eng is such is *prima facie* our law. except so far as our legislature have altered it. But those statutes which have been enacted since our colonization are not so even *prima facie*. In some states the body of the Eng statutes have been adopted down to a certain period by the legislature & incorporated with their stat law as the state of N. York. But in Mass. we have no such statute.

In the two preceding lectures I have given you a general view of the nature of municipal law. & of unwritten particularly.

All Statutes are either public or private. or as it is sometimes expressed general or special.

A public stat. is one which regards the whole community. a private statute regards particular individuals or private concerns which is indeed in the nature of an exception to the general law. 1 Bl. 85. 6.

The application of this distinction is not always obvious. Most statutes do indeed literally & in language regard the concerns of the whole community as the Stat. of Frauds &c. Such are plainly public. Again there are statutes prohibiting certain acts



and inflicting penalties upon him who commits them, which are public. Doubt respect to all these & the like there is no difficulty in making the distinction. But there are cases in which statutes relating to some one class of men are considered public even though the relation is immediate & in terms. — The rule in these cases appears to be that if the class to which the law relates amounts to a genus, it is a public st. if to only a species it is private. This is somewhat vague, for that which in relation to a higher class is a species to a lower may be a genus it is however the only distinction given in the books.

A stat. relating to all mechanics is agreed to be a public statute, but one relating to all tailors or blacksmiths is a private one here it is said the class cannot be divided into a species. A statute relating to all persons capable of serving process is public referring to a genus, but if it referred to all Shffs. constables &c it is private for the class is divisible only into individuals — 6 Bac. 148. 152.

On the other hand if one individual only is referred to it is clearly a private statute. So that there appears no difficulty in applying the distinction except when the statute relates to a class. 1 Bl. 86. 4 Co. 76  
2 Saund. 154. 2 Ray. 120. 381. 1 Lev. 86. 2 Bac 408 25. 15. 575

Every Statute that regards the King is a public statute for every subject has an interest in the King. So an act in relation to the present of His in his official capacity must necessarily regard the whole community. 4 Co. 77. 8 Co. 28. 138. Hob 227. 1 Lev. 209. 1 Phil. Ev. 238.

Hence a st. giving a forfeiture or penalty to the king or the public is a pub. stat. although it operates upon a particular class of men. 4 Bac. 640. Stun. 429. On a similar principle a st. concerning the public revenue is a public stat. although raised from a class of persons amounting only to a species 10 Co. 57. Plow. 65. 12 Mod. 249. 613. 4 Bac. 640.

It is not unusual for the legislature to declare a stat. public which is in its own nature by the principles of the C.L. private. They doubtless have the power and for the sake of public convenience often exercise it, as it prevents the necessity of counting upon & reciting the stat. when an act is bro't upon it. - This is the common practice in bond in acts of incorporation as of banks insurance companies & the like. -

A stat. may be in part public & in part private as in different sections. -

Another division of statutes which like the other is practically very important. is into Declaratory & Remedial as the divisions are usually termed. - One being declaratory of the C.L. the other remedial of its defects.

A declaratory st. merely declares what the C.L. is and always has been. and makes no new law. To this division may be added those stats. that are declaratory or explanatory of former statutes. as the St. of 34. is of the St. of 32. Ann. 8<sup>th</sup>. this division of statutes is not noticed by text books generally Pow. Dev. 141. 4 Bac. 650. 1 Bl. 86.

Calk 354. Conth. 396.



Remedial statutes, on the other hand introduce a new law by supplying the deficiency or abridging the superfluities of the b.l. as the st. of frauds &c. They are but fund declaratory sts. and with the exception of the penal stats. most of the statutes come under the denomination of remedial. 1 Bl. 86.

Another coordinate division is that of penal & beneficial. this last is sometimes called remedial. beneficial however is the word used by D. Coke as contradistinguished from penal and thus remedial will be properly opposed to declaratory Cro J. 414. 15. 4 Bae. 650. 3 Co. 76. 1 Wils. 126. 7 T. Rep. 259.

I would here observe that the word penalty in its most extended sense is synonymous with punishment. Cro. J. 415. It is now however more appropriately used to signify a pecuniary mulct. & now in strictness all statutes giving higher remedies than the rules of natural justice require, as double damages in trover would seem to partake of the nature of penal acts as to the resp. but I do not find them so considered in the books. Salk. 212. 1 Wils. 125. Cro J. 414. Com. Dig. "Action H. 41.

Statutes giving costs to the prevailing party in an action are always held to be penal. the reason is that costs are unknown to the C. & are now considered as punishment. they come in the place of the old b.l. amercement. the form of which is still kept up tho' it is merely nominal. — At C. when the Def. prevailed

the diff was annexed. but now the statute gives cert.  
 The first stat. giving costs was that of Gloucester  
 Ed. 1<sup>st</sup> 1 Bac. 511. Fulk 205. Carth. 189. 122. & Mod.  
 7. 4 Bac. 651.

c In action brot by an individual in his own  
 right to recover a penalty is a civil action tho the  
 stat on which it is brot is a penal one. Thus the statute  
 of Eliz gives £10 to the prosecutor for perjury, & an act  
 to recover this is a civil action between A & B.  
 so of the stat of usury. & quita actions up on it.  
 What determines the action to be civil or criminal is  
 the form of process. If it commences by writ or declara-  
 tion it is civil of course. but if by indictment or in forma  
 tion on which the process is forthwith it is criminal &  
 this distinction is a very important one in practice.  
 Cowh. 382. 391. 1 Wils. 125. & T. Rep. 753. 7 st. 257.  
 In consequence of a mistake as to the law in this point  
 in the last session of the sup<sup>r</sup>. b<sup>y</sup> in 18 suits  
 for the penalty on the st. of usury were thrown out.  
 if the action is civil it is transitory if criminal it is  
 local.

All statutes are said to be either affirmative or  
 negative. this division is practically of no use & appears  
 to be perfectly nugatory. its foundation is in the phra-  
 seology of the st. 1 Rob. 89. 4 Bac. 641.

With respect to  
 the commencement of the operation of statutes. the Eng  
 rule is that they commence from the first day of the  
 term or session of Parliament. in which they are  
 enacted unless some other time is prescribed.



and this rule was founded on the maxim that there is no fraction of a day or term - in point of fact a st. might thus become retroactive. the according to the theory of the C. L. it would not. Hob. 11. 222. 309. 2. Ray 371. 1 Sid. 310. 19 Vin. 495.

And on this principle it has been determined that if two states enact at one session laws on the same subject & no time fixed by either, neither shall have the priority. & if they are repugnant each would repeal the other pro tanto. It has however been lately decided that that which was last in point of fact should repeal the other pro tanto & this I think is the better opinion. 4 Bac. 636. 6 Mod 287. 19 Vin. 520.

The only general rule as to the operation of statutes has been established in Com. and there is no precise rule substituted. the courts however have determined that no man's rights are to be affected by a statute until he has had time to find out what it is.

#### Of the construction of statutes.

The construction of statutes is the means of discovering the intention of the legislature & there will properly be in it always the law. In the construction of statute and especially remedial ones three points are principally to be considered, viz. the old law, the mischief & the remedy, and a statute should if possible be always so construed as to suppress the mischief and advance the remedy. 1 Bl. 87. 3 Co. 76. The true first and chiefly to be regarded & they will discover to us the remedy, this rule

has been exemplified in the case of the St. forbidding  
bishops to make long leases &c. see 1 Bl. 87.

With regard to  
the construction of words & phrases of stat. the same  
rules are to be regarded as in the construction of un-  
written law of which I have before spoken.

A very impor-  
tant rule in the construction of stats. is that verbal  
stat. are to be construed strictly, or according to the  
letter. 1 Bl. 88. 3 Co. 7. 48. Plow. 17. Leach 107. 9 in a pe-  
nal st. is not to be extended for the purpose of bring-  
ing a party within the penalty. 4 Con. R. 64. 2 Wheat. 119.

This rule has in some  
instances been pursued so closely as to make it  
ridiculous. Thus st. 1 Ed. 6 took away the benefit of clergy  
from those who are convicted of stealing horses. the b<sup>t</sup>  
said he who had stolen but one horse was not within  
the st. As a st. forbade under penalty the shooting of  
dogs. the b<sup>t</sup> said that st. would not protect bitches.  
But this rule requires explanation & as explained above  
would not be correctly understood. the rule is that  
the stat. is to be construed strictly against the party  
charged or subject but liberally or equitably for  
him. Thus a person is not to be adjudged within the  
penalty of a st. unless he is within the letter of it, tho  
clearly within the spirit of the law. And on the  
other hand a person who is within the letter may be  
exempted by not being within the spirit of the  
law. & hence at every point without these rules of  
construction would be intolerable.



The rule then is that the spirit may be consulted to take out those who are within the letter, but not to bring in those who are without. So that it appears that it appears no one can be adjudged guilty, who is not within both. I find this rule nowhere laid down explicitly but in 1 Haw. Tab. Pen. St. see also Leach. Gen. Cases. 387. 233. 310 1 Hawk. 53. 61. 116. 131. 138 & Bl. 193. Plow. 17. 465. O Bae. 390.

There are several modern cases in which this rule has not been strictly followed & when the letter has been abandoned to bring the party within the penalty who was clearly within the spirit. Leach. Gen. Cases. 1. 70. 295.

I observed to you that a penal stat. is to be construed strictly, and that the reason & spirit of the law may be consulted to relieve a party from the it may can be to bring him within the penalty.

Hence in general any universality of expression in a penal stat. will not include those persons who by reason of legal incapacity are exempted from similar penal laws, unless indeed they are specified. Thus the st. that enable, that those persons who commit certain acts shall be subject to such & such penalties will not include idiots or lunatics nor if the punishment is corporal infants, to include them appropriate language must be used 19 Vin. 501. 1 Hawk. cap. 64. Sec. 35

But notwithstanding this rule that penal stat. are to be construed strictly it must be

confirmed that this is an evasion of the intention of the legislature & L. Kingdon says that intention is the true rule & it is universally true that the intention of the legislature is not to be disregarded merely because the stat. is penal. But this rule is so vague as to be unintelligible. 1 T. Rep. 3. Plow. 86. 3 Co. 7. 8. 6 Bac. 391.

Upon this same principle of construction if the repetition of the offence incurs an augmented punishment. that augmented punishment is not to be inflicted unless judg<sup>t</sup> has been given against the offender for the first offence. and indeed he must have been convicted for the first offence before he committed the second. to incur the punishment of a second. this appears to be carrying the benignity of the law a great way. Our courts however say that it is in terrorism. & the convict ought to have the salutary discipline of the first before he incurs the increased punishment 1 Hale. P.C. 324. 427. 570. 685. 1 Salk. 323. 1 Hawk 168. 1 Root. 52. 103. 2 Balc 349.

The rule of strict construction against the subject has not always been followed for under the H. of Ed. 3<sup>d</sup> it has been determined that treason in a servant to kill his master's wife. this decision I should justify. Plow. 86 4 Bac. 637. Cro. 647. 71. 6 Bac. 360.

It has been determined by our courts that when the same felony is repeatedly incurred by a continuance of the same offence. as for a misander. suspect to prove a will &c. only one felony can be used for & recovered at the



same time, they being considered as a stimulus to duty. This however is opposed to the Eng. rule: 2 Swift. 289. 1 Root 52. indeed the Eng. rule is directly the reverse see. Parker bar. 57.

It is a maxim of the Law that the penal code of every country is strictly local. this is founded upon the very elementary principles of Municipal Law. The remedy is to be sought by the party injured. hence the penal laws of one state cannot be noticed in another so as to affect the rights of citizens in the latter. thus a thief cannot be punished in Con. for a theft committed in N. York. it was no breach of the laws of Con. of which only our courts take notice. 1 Kepl. 79. 80. 1 Hen Bl. 123. 3 T. Rep. 733. Phil. 38. Vattel. lib. 1. cap. 19. Sec. 232.

The penal laws of every country however extend to all aliens while within that country. If they commit crimes there they must be tried by the laws of that country for they owe a temporary allegiance to them as long as they reside within their jurisdiction.

It has however been determined in this state & in Mass: that if goods be stolen in one state & transported by the thief into the other he may be tried & punished in the latter. this is to me a very extraordinary decision & one against which I have unsuccessfully contended. 1 Mass. Rep. 116. This point has been settled directly the other way in N. York. 2 Johns. 477. 9. and by Judge Patterson of the U.S. court. in the case of *Ms. v. Page*. and I conceive these latter authorities to be demonstrably the

law. It has been opposed on this principle in the Eng. practice that when a felony is continued into different counties it may be tried & punished in either. But the analogy cannot be extended to two separate governments like two states governed by different powers, where as there the same punishments are inflicted under the same supreme jurisdiction. Suppose the punishment in one state was a fine for stealing horses & in the other death. it would certainly be very inconsistent in a t. of Gov to inflict death on a man for committing a crime in Mass. for which the he could only be fined. for then it is impossible for a court judicially to know whether what we call theft is any offence at all in a neighbouring state. he may have come honestly by the horse & bringing him into this state is of itself certainly no offence. besides what we call larceny might be & indeed in Sparta was under certain circumstances no offence. And what is still worse a trial & acquittal or a conviction is no bar to an indictment in another state.

Beneficial statutes are to be construed equitably or liberally that is according to their true spirit. and may be restrained or enlarged to affect the intention of the legislature. There is hardly a single beneficial statute that does not afford examples of this rule. Thus the 11. 9 Ed. 3 gives a remedy a q. <sup>1</sup> <sup>2</sup> <sup>3</sup> <sup>4</sup> <sup>5</sup> <sup>6</sup> <sup>7</sup> <sup>8</sup> <sup>9</sup> <sup>10</sup> <sup>11</sup> <sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup> <sup>16</sup> <sup>17</sup> <sup>18</sup> <sup>19</sup> <sup>20</sup> <sup>21</sup> <sup>22</sup> <sup>23</sup> <sup>24</sup> <sup>25</sup> <sup>26</sup> <sup>27</sup> <sup>28</sup> <sup>29</sup> <sup>30</sup> <sup>31</sup> <sup>32</sup> <sup>33</sup> <sup>34</sup> <sup>35</sup> <sup>36</sup> <sup>37</sup> <sup>38</sup> <sup>39</sup> <sup>40</sup> <sup>41</sup> <sup>42</sup> <sup>43</sup> <sup>44</sup> <sup>45</sup> <sup>46</sup> <sup>47</sup> <sup>48</sup> <sup>49</sup> <sup>50</sup> <sup>51</sup> <sup>52</sup> <sup>53</sup> <sup>54</sup> <sup>55</sup> <sup>56</sup> <sup>57</sup> <sup>58</sup> <sup>59</sup> <sup>60</sup> <sup>61</sup> <sup>62</sup> <sup>63</sup> <sup>64</sup> <sup>65</sup> <sup>66</sup> <sup>67</sup> <sup>68</sup> <sup>69</sup> 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stat. 32 Am. 8. enacts that "all persons" may devise lands. The courts however determined that the words "all persons" did not include idiots, lunatics, persons convicted, &c. & the explanatory st. of 34 Am. 8 sanctioned that decision. 3 Bl. 430. 3 Co. 7. 1 Co. 123. 11 Co. 71. Plow. 365. 465. Pow. sec. 354. 1 Veg. 300. Pow. L. 140.1.

Under this rule of construction an act or transaction declared by stat. to be "void" is construed by the courts to be but voidable, see the distinction between void & voidable explained in the title of parent & child. — The rule is this, if the mischief intended to be prevented would be let in by construing the act void, it must be construed voidable. on the other hand if the intention of the legislature would be frustrated & the mischief not prevented by construing the transaction voidable it is to be construed voidable only. Thus if fraudulent conveyances were to be construed voidable only now that the fraudulent parties themselves could invalidate the conveyance. 1 Bl. 87. 3 Co. 59. 60. 10 Co. 59. a. Geo Eliz 141. 207. 2 T. Rep. 606. 7 T. Rep. 310. 2 New Rep. 413.

This rule does not extend to Ex. off<sup>s</sup> as the heads of Depart.

When a stat enables a court to do a matter of justice to a party, the general rule is that the court is bound to do it, in <sup>all</sup> cases falling within the statute. In these cases the permissive language is construed as if it were imperative. Thus the st. 8 & 9 W. cap. 10. says the court may grant Dep<sup>t</sup> his costs on information. the Ct<sup>h</sup> held they had no discretion. <sup>263</sup> any power. 2 Hawk. 374. 5. 1131. 5 T. Rep. 538. 4 Bac. 644. 3 Bac. 643.

A statute taking away a C.L. remedy however is to be construed strictly. This rule does not seem to be universal in practice. thus the str of limitations have in many respects been construed liberally. although they after a certain length of time take away a C.L. remedy. 4 Bac. 650. 10 Mod. 282. 1 Salk. 421. 4 T. Rep. 308. Remington on Eject. 58.

A statute explanatory of a former stat. is always to be construed strictly and never to be extended by construction. for that would be to construe what is in itself construction & thus there would be no end of construction upon construction. Carth 396. Salk 534. 4 Bac. 650.

When a st. is partly penal & partly remedial or beneficial. the construction is to be strict as to the former & liberal as to the latter. This is exemplified in the st. against fraudulent conveyances. for it has the two fold effect of declaring the conveyance void & of punishing the offender. the first which is the remedial part is to receive a liberal, the latter strict construction. Plow. 36. 57. 59. Pu. Cha 215 1 Bl. 88. 3 Co. 82. 4 Bac. 650.

The different parts of a st. are always so to be construed, that the whole may take effect. or as it is sometimes said, that the whole st. may stand together. repugnance is if possible not to be reconciled. if irreconcilable the latter part repeals the former pro tanto. A saving that annihilates the whole body of the st. is utterly void. For



court is never to suffer a point to destroy the whole or to change the legislation with such an abundance. 1 Co. 41. 1 Bl. 89

The rules of construing stat. are the same in a court of Eq. as in a court of law tho they have different methods of affording relief under them. 3 Bl. 431. 438. 1 Font. 22 Doug 264.

1 Valt. P. 97.

It is in construction of all municipal law both written & unwritten to be repealable. If then the C.L. & stat. differ the latter will prevail tho former not however on the idea of its being of higher authority, but on the ground that the st. is the last intention of the legislature. that it is the last determination of the legislature. the last expression of the sovereign will. and on the same principle the last stat. repeals the prior. so of different sections of a statute. 1 Inst. 111. 115. 4 Bac. 638. 641. 1 Bl. 89 11 Co. 63.

and it follows that as every statute is repealable a clause in a stat. that it shall never be repealed is void. such a clause is in direct derogation of the authority of a subsequent legislature & thus at length the power of making laws might at length be completely taken away. So then every act in derogation of a subsequent legislature is void. 4 Bac. 638. 1 Bl. 90. 4 Inst. 43.

But the law never favours a repeal by implication. When it is claimed that

a prior & latter stat. or clause of a stat are re-  
 ingnant. that repugnancy must be clear to what  
 the prior. for it is presumed that if the legisla-  
 ture intended to repeal they would have done it  
 expressly. 11 Co. 63. 1 Roll. Rep. 88. 10 Mod. 118.

It is said  
 in some of our books that an affirmative st. does  
 not repeal the C.L. upon the same subject. 1 Anst.  
 111. 115. 4 Bac. 641. Now this has arisen out of  
 that division of stat. into affirmative & negative  
 which I hold to be perfectly senseless. an affirma-  
 tive stat. does repeal the C.L. if it is repugnant  
 to it. E.g. Suppose the rule of the C.L. to be that  
 a debt record with no cap is to have 15 days as  
 I believe that rule is. & then there should be a st.  
 enacted declaring 5 days sufficient. it would  
 be an affirmative stat & still repeal the C.L.  
 The true rule is this if a statutory provision is  
 inconsistent with a rule of the C.L. it repeals  
 that rule. Com. Dig. a Stat. C. Plow. 206. Leach  
 Brn. L. 252. 1 Bl. 89.

If a stat. gives a remedy in a case in  
 which there was one before at C.L. & without expressly or  
 impliedly abrogating the one at C.L. there will be  
 two concurrent remedies and the stat. remedy is called  
 an accumulative remedy. 2 Bur. 803. 805. Com. Dig. a Stat.  
 C.

If a penal stat. inflicts a higher or lower penalty  
 than is inflicted by an older st. the older is repealed.  
 for as the latter varies it is clear the legislature in-



tended the former not to remain in force. 4 Bur. 2026  
4 Bac. 654. Leach Cr. Cass. 252.

And when a statute inflicts a lower punishment than is inflicted by the C.L. the C.L. remedy is repealed. But when a higher the st. remedy or punishment is accumulation the C.L. remedy remains in force, so that a party offending may be prosecuted either at C.L. or by state. 4 Bur. 2026. 2 Show. 30. 16 Mod. 337. 4 Bl. 138.

And of firmation stat. it is said does not repeal an affirmation stat. this is an unmeaning and arbitrary rule. And at any rate if there is a repugnancy between them the latter will repeal the former. 2 Show. 30. 1 Bl. 89. The only true criterion is this: whether the latter stat. is inconsistent with the former.

When a repealing st. is itself repealed, the original st. revives, for the repealing was only the intention of the legislature that the former should remain no longer repealed. 4 Bac. 638. 1 Bl. 90.

When a stat. is repealed by two or more stat. as then, and two of them are abrogated, the orig<sup>l</sup> stat. remains repealed, for the remaining third is sufficiently indication of the legislative intention. 4 Inst. 43. 4 Bac. 638.

If a st. that has been repealed is revived the repealing act, if it is merely a repealing <sup>st.</sup> becomes void in toto, if more it becomes void pro tanto, for it is impossible that the repealing clause

should remain in force. 2 Inst. 686. 4 Bac. 638.

Acts

done under a stat while it remaining in force are justifiable binding & obligatory altho that stat is afterwards repealed — It is said that if a stat is declared null & void it will not justify acts done under it. No doubt a b. of justice can declare a stat null & void to have that effect. But a legislature can do no more than to repeal & it would be monstrous to suffer any usurpation of thing amount to more. Inst. 233. 4 Bac. 638.

It is a genl. rule arising indeed out of the very definition of Mun. Law. that a st. cannot have a retroactive operation. the definition requires that it be prescribed. 1 Bl. 46. 2 Mod. 310 Hence if a stat. after violation & before judgment is given agt. the offender, is repealed & a new one made, the judgment of neither can be pronounced agt. the offender. unless indeed the former is expressly continued in force as to all acts committed before it was repealed. for the former was repealed before judgment & the offender's guilt was no violation of the latter. Instances of this kind have occurred & the consequence is that the legislature usually directs the repealed stat to continue in force as to all acts committed before the new one was enacted. 1 Bl. Rep. 457. 1 Hawk 169. 4 Bac. 636. Post 57.

But if a contract or other contract is made which is lawful at the time but becomes unlawful by a subsequent stat. the contract is annulled. This if a



contract should be made to import certain commodities and before the time of performance arrives an embargo, non importation act or a declaration of war should render the performance since the contract would be annulled. It amounts to the same as an inevitable accident. Salt 198 1 Pow. 60. L.L.L. to L.L.L. 1 Foul. 211. 8 T. Rep. 267. P. Bay. 317. 321. 1352 2 P. Wm. 218. — So 'on the other hand if one covenants not to do an act which is afterwards made his duty by law to do the covenant would be annulled. As if an apprentice should covenant not to enter the public service & a law afterwards makes it his duty he might be ruined by fulfilling his contract. Salt 198.

But if one covenants not to do an unlawful act a stat. making that act lawful does not make the contract void. there is no inconsistency in obeying both. ib. anc.

If a contract is made which a stat. declares illegal or void. a subsequent act repealing that stat. does not give the contract validity nor not set it up. Instances of this kind occur under the stamp acts of contracts to be performed & in the interim the act was repealed. in such cases the contract is void ab initio. & we are to look at the state of circumstances as they were when the contract was made. 1 Hen. Bl. 65.

If a lawful contract be made complete

performance of which is prohibited by a subsequent stat. a performance of the parts not prohibited will if possible be enforced in Equity & I trust in a court of Law if that court could adapt its remedy to the cases. Thus a Dean & Chapl<sup>ns</sup> two covenanted to make a lease for 90 y<sup>rs</sup> & before lease made a stat was enacted forbidding such bodies to make leases longer than for 40 y<sup>rs</sup> the b<sup>ts</sup> obliged them to make a lease for 40. Plow. 284. 2 Hen Bl. 163. 581. 1 Font. 209. 211. 25<sup>th</sup> Rep. 254. 1 Pow. Gen. 448. 450. 2 ib. 31.

The Constitution of U.S. prohibits the several states from making ex post facto Laws. or laws impairing the validity of contracts. Art. 1. Sec. 10. - now it might become a question whether a stat. making a covenant void according to the rules above, conflicts with this section of the Constitution. I take it not, and suppose that that section applies to those acts which directly make void contracts between individuals, and not those which consequently have that effect. If it were not so individuals might deprive the legislature of the power of making laws.

It is said that a stat requiring what is impossible is void. There is no instance of this kind. but the rule is a qualification to the principle, for the Law obliges no man to do impossibilities. 1 Bl. 91

It is said by R Coke & Stobart & indeed by Judge Bl.



in one place that a stat contrary to reason or the  
divine law is void. But Mr. Blackstone afterwards  
opposes this rule in that extent. — If the requirements  
of the stat. are prohibitive it is not for the courts to decide  
whether they are reasonable or prudent. for they would  
thus have the supreme power. As to the latter  
part of the rule the judges are bounds of municipal  
not of the divine law. They are to construe  
so as to make a stat. reasonable & not to interfere  
with the divine law if possible. — If however  
the intention is plain they must administer it or  
cease to be judges. If their consciences are too delicate  
they may resign as did <sup>St. John</sup> Hale in the time of  
the commonwealth. — Besides there are many  
points in the divine law concerning which men  
kind differ — thus a quaker denies the right to  
administer an oath. So the rule cannot be true  
in the extent in which it is laid down. 8. Co.  
118. Hob. 87. 89. 1 Bl. 41. 91. 1 Font. 23.

It was once  
a question whether approved to the written constitution was  
void or could be declared void by courts of justice.  
it has however now ceased to be a doubt. The consti-  
tution is the paramount law of the land and  
as courts may declare a latter st. to repeal a former  
or repugnant one. they may also declare a stat  
void which is repugnant to the constitution. and  
indeed a jury can decide upon it under the direc-  
tion of the court. U.S. 4 Hott. 2 Fed. 293 and on-  
ward.

If a stat. makes a new law concerning an old offence & appoints certain particular judges to execute it, this would not take away the jurisdiction of courts of previous general jurisdiction, as that two justices should try certain causes without abrogating the higher jurisdiction the ancient cts. would still have cognizance for their ancient jurisdictions are not to be ousted by implication. 2 Hawk. 18. q. 414. q. 60. 118. Salk 452. 2 Bur. 1042. 156. 87.

But if a st. creates a new offence & establishes a new jurisdiction for the trial of it, it seems that the general jurisdiction of other courts is excluded. The case supposed is one in which those courts had no prior jurisdiction of course the rule as to implication could not apply. 1 Hawk. q. 2 Hale P.C. 5. 1 Gild 196. Cro. J. 643. Cowp. 524. 2 Hawk 302. not.

If a stat. confers special authority upon individuals affecting the property of other individuals; that authority must be strictly pursued & must so appear upon the face of the proceedings. As in case of commissioners of roads &c. These com<sup>rs</sup> have no discretionary power & if they do not thus strictly pursue their authority they are trespassers. — Cowp. 26.

If a st. enables a certain set of men to do by majority certain acts and constitutes a certain number a quorum, it seems that a majority of the quorum cannot do a binding act without it is also a majority of the whole. They are creatures of the stat & must exercise their authority pre-



and you will observe that I am not now speaking  
of corporations. 3 Mod. 13 & Bac. 642. 10 Co. 30. Mot. 211.  
3 T. Rep. 594. & T. Rep. 810. 822

The authority of a private  
nature given to two or more is joint & not several  
unless it is otherwise expressed. of course the authority  
does not survive to the survivor. As authority given  
to two to sell the property of an infant. But when  
the authority is of a public nature or pro bono publi-  
co. it does survive being in the nature of an office  
Gha. 117. & Bac. 403. & 442. 1 Inst. 181. 1 Root 67.

If a power  
of a public nature is given to several. the act of a  
majority of them in the Execution of it. all being  
present is the act of all & binding. 1 Inst. 181. b. 1 B.  
& P. 229. 2 Bur. 1017. 1020. 3 T. Rep. 592. - Thus if five  
were made comm<sup>rs</sup> of roads or bridges. the act of them  
all being present would be binding.

In the case of cor-  
porations the rule is different. for if all are summoned  
the act of a majority of them present, however small  
the number present, will bind the whole: provided  
there be nothing in the act of incorporation against  
it. 2 Attk. 211. 1 B & P. 236. 7.

Pleading statutes. I am now to treat of pleading  
statutes & the mode of prosecuting upon them.

Merely  
pleading a stat. consists in stating those facts which  
bring the case within it. & it need not be named or

referred to all for the purpose of pleading it. Thus in a plea of the st. of limitations on ap<sup>t</sup> def<sup>t</sup> pleads now ap<sup>t</sup> inf. et. an. so of frauds. def<sup>t</sup> only pleads that there is no note or memorandum of it. using the words of the stat. for forms see 3<sup>d</sup> 2. Ray 11. 221.

I would here observe that pleading counting upon & reciting a stat. tho<sup>se</sup> mixed in the books as synonymous are different in their significations. pleading a st. has been defined. counting upon a st. consists in an express reference to it by the words, as "by virtue of the st. &c" or "ag<sup>t</sup> the form of the st. in such" "case &c" reciting a st. is different from both the former & consists in repeating or quoting the stat. or its contents. A st. is pleaded sometimes by reciting it: but pleading & reciting are very different. — pleading a st. does not necessarily imply a reference to it. —

It is a general rule that a public stat. is to be taken notice of by the judges, so it need not be recited if the facts are sufficiently stated. the court taking judicial notice of will apply the st. to them.

But of a private st. the judges are not bound to take notice unless it is specially pleaded. — For it is a matter of fact or evidence of the existence of which the court is no more to be presumed to have knowledge than of the existence of a deed or note. of course it is no bar unless specially pleaded. 1 Bl. 86. 2 Co. 76. Cro. Eliz. 206. 1 Bac. 38. 10 Co. 57. 2 Mod. 57.

According to C. L. then it



is necessary to set out a private st. in the pleadings to take advantage of it. In Con. however a private as well as a public stat. may be given in evidence under the genl. issue for him anything except an act of P<sup>l</sup>ff amounting to a discharge, may be given in evidence under that plea. H. Con. 3 L. 2. 552.

Even here however if one defends by st. he must read it to the jury for it is a matter of fact or evidence as much as a deed.

But if an action is founded on a private statute the P<sup>l</sup>ff must as well here as in Eng. recite it as a specialty. for the Con. st. extends to pleadings only on the part of the Def<sup>t</sup>. & if P<sup>l</sup>ff does not thus recite it, no cause of action can possibly appear for there is nothing to which to apply his facts. 1 Bac. 38. 4 ib. 655. 4 Co. 76. 10 ib. 57. 2 East. 341

A public Statute however when it is necessary to be pleaded (and there are such cases) need not be recited. for the judges are bound ex officio to take notice of its provisions. There are no cases in which it is necessary to recite a public stat. and it is a most bungling & undignified proceeding to do it. Mansfield said that when it was done he would hold the pleader to half a tithe. it lengthens the word & increases cost to no purpose. ib. anc.

There are cases in which they must be counted upon altho they need never be recited. But it is not of course necessary to count upon

when it is necessary to plead them. —

It observed that it is not necessary to write still a misrecital is not in all cases fatal, altho it is in some even after verdict. On this subject it is said that the misrecital of an immaterial part is not fatal after verdict. You will however find a variety of rules as to this point. Cro. Ecl. 376. 136. 532. 4 Bac. 659.

Now I take it to be impossible to reconcile all the authorities on this point. P. Holt says that it is not fatal unless the party ties himself up to the stat. (as he says) as recited, as by concluding with the words "according to" or against the stat. recited <sup>the words of the statute</sup> of force. If however the pleader, in his conclusion, says against the st. made & provided without the words aforesaid or words of like import; it is not fatal, for the judges will take judicial notice of the true stat. P. Ray. 382. Plow. 74. 84. Cro. Ch. 233. Freeman 211. 2 McNally 516. Long 90 to 92. — This appears upon the whole to be the true rule whether the part misrecited be immaterial or not. After all however it is still unsettled.

The misrecital of a private st. is never fatal on demur or after verdict unless it is recited upon oath & affirmed on oath granted, for unless it is recited on oath the judges cannot know the provisions of it. it is indeed exactly the same as a note of hand or bond. — The proper way would be either to plead and trial record, & then the st. would not support the declaration or to show the variance by special pleading, or to recite it on oath & then demand for which it is



recites the party may answer. 4 Bac. 658. 2 McElroy  
517. L. Ray. 382. 2 Mod. 241. 1 Sid. 356.

And a public  
stat. when relied on as a defence to defeat a specialty  
as a bond. must be specially pleaded. Thus the stat.  
of usury. Def<sup>t</sup>. must plead such facts as bring  
the case within it. So of a gambling debt. Coke  
says that is required from the solemnity of specialties  
but if this were the true reason how can the genl.  
issue be ever pleaded to a specialty. - For this rea-  
son is that when the stat. is relied on as evidence it  
would be inconsistent with a plea of non est fac-  
tum. 5 Bac. 419. 5 Co. 59. b. 119a. Hob. 72. 3 Salk 391

In hon<sup>r</sup>. the rule is otherwise by virtue of two statutes  
of pleading. for here a stat. to defeat a specialty  
may be used under the general issue. H. 6m. 342.  
By a rule of our Sup<sup>r</sup>. 6<sup>th</sup> if the defence to a specialty  
is such as must at C. be specially pleaded. the Def<sup>t</sup>.  
must give notice to Pl<sup>ff</sup> that he is about to give it in  
evidence.

In pleading upon a private st. or pleading  
it in any way - it is always necessary to recite it; not  
verbatim but all that is material must be stated  
1 Co. 76. 2 Roll 266. 2 Mod. 57.

When a statute is partly  
public & partly private. the private part must be  
recited. so the last rule holds here. 10 Co. 57. Hob. 227.  
But it is never necessary to recite the title or preamble  
of any st. for neither of them constitutes a part of

the law the title is only the name which the legislature chose to give it. and the preamble is only a statement of the reasons, objects, or motives of the stat.  
3 Co. 33. 4 Bac. 655. 658.

Hence it was once held that the misrecital of the title of a public act was not fatal on Dem<sup>r</sup>. tho it has since been decided otherwise. 2 Ray. 77. Hawk. 324. 6 Bac. 398. 6 Mod. 62. & after all, I think that neither of the rules as to the misrecital of a pub. stat. correct in the extent. They stand thus that the misrecital of a public stat. is fatal on Dem<sup>r</sup>. and again that the misrecital of the title is not — I think they ought both to be qualified in the manner of 2<sup>d</sup> Holt which I have before mentioned to you.

In Eng. the recital of a stat. when necessary to be recited as in all cases of private stat. must contain the date of it & the place where it was made or it will be ill on Dem<sup>r</sup>. indeed the same form is required as in pleading deeds. &c. 2 Hawk. 246. Cro. J<sup>st</sup> 211. 19 Vin. 507. Cro. Ch<sup>st</sup> 232. Coop. 474. Com. Dig. a<sup>m</sup>. stat. I.

As to a Dem<sup>r</sup> on a private stat. and its record may be pleaded; but not so as to a pub. stat. for as the existence of it is no question of fact it would be negatory; but in case of private stat. the rule is different because the reason is different. 2 Co. 76. 8 Co. 28. Cro. Eliz. 355. 2 Mod. 57.

It is a general rule that in decla-



ring on a pub. stat. the pleader need not count upon it. that is. he need do no more, than state the facts which bring the case within it. 1 Bac. 38. Carth. 382. Cro. Eliz. 601.

But to this general rule there are several exceptions - 1<sup>st</sup> If there are two concurrent remedies, one at Ch. & an accumulative stat. remedy. if the pleader would found his action on the stat. he must count upon it. or it will not be known which remedy is sought or rather that at Ch. will be presumed. 4 Bac. 18. Com. Dig. Act. st. 9.

2<sup>d</sup> In an act. or prosecution on a penal stat. the complaint must always count upon the stat. even tho' the stat. is a pub. one. & the action brought to recover or enforce its penalties. This rule I consider as a positive one of which I never could see the reason for thus appears to me no ground of distinction between this & a civil action on a public stat. Plow. 206. 1 Bac. 38. Kyllinge 32. 1 Vent. 103. 7 T. Rep. 521. 2 East. 333. 6 Id. 126.

3<sup>d</sup> If a public st. gives a new action i.e. an action unknown at Ch. the party who sues upon the stat. must count upon it. Some of the books say that the party must recite it. I understand it however as used synonymous with counting and it appears that Ellenborough so understood it. he observes that this confusion was occasioned by a former rule according to which the stat. must be recited.

ted in this case. 19 Vin. 504. 4 Bac. 657. Falk. 588.  
Holl. 634. 2 East 334. 341. This an act of waste to recover  
the locus in quo was wholly unknown to the C.L.  
It was always holden that the stat. which gave  
it must be counted on. I confess I do not see  
the reason of it, tho I suspect it to be that the par-  
ty must show his ground of action.

When a statute  
extends an old remedy to a new case the general  
rule holds, viz. that counting upon the statute is not  
necessary. Thus the st. of Ed. 3<sup>d</sup> gave an executor the  
action of trespass to recover the goods of his testator, tres-  
pass is an act well known to the C.L. so the stat. need not  
be counted on. Sayer 83. b. 85 a & b. 2 Bac. 437. 545.  
Com. Dig. c. 15. H. H.

The result then of the general rule with  
the exceptions is this. that in an act on a public statute  
not penal it is not necessary to count upon it, un-  
less there is a new sort of action given by it, or  
unless there is a concurrent remedy at C.L. for there  
are the only two exceptions in civil cases. Thus if  
a stat. merely creates a right or duty & inflicts no penalty  
but merely gives damages it is not necessary to count  
upon the stat. so if a stat. not penal merely affects  
a right or duty & does not expressly give any remedy  
the stat. need not be counted. it leaves the C.L. to furnish  
the remedy. Carth. 382. Salk. 212.

I observed that in all  
prosecutions founded on penal statutes the complainant  
must count upon it. Further when one stat. prohibits



an act and another inflicts a penalty the prosecutor or complainant must count upon both, for both together constitute the law or sanction. One is not the entire law for one constitutes the offence the other prescribes the punishment. Plow. 206. 4 Bac. 656. 2 East. 233.

And offence may be laid in one indictment as being against the C. & St. Law. this however must be done in two distinct counts. To have both in one would constitute a duplicity that would quash the indictment. If the prosecutor is doubtful he may prosecute on both in two counts but I take it that he cannot in one. Leach Cr. Cas. 235.

When part of the offence consists of committed acts against the state & part ag<sup>t</sup> the C. L. it is probable & indeed necessary to count upon the state, but the words *contra formam statute* can be referred to that part of the offence only which is prohibited by stat. Thus entering by force on one's land is an offence at C. L. & printing in it is an offence by stat. then then the words should refer to the printing merely. Salt. 212. Centt. 382. - S. Holt in this last case said that saying that Def<sup>r</sup> printed in the Plff's close is sufficient without the words *contra formam statute*. -

If a temporary public statute having expired is revived by a subsequent stat. and the circumstances are such as to require the stat. to be counted upon it would be sufficient to count upon the former because that prescribes the law, the latter only revives it, tho it would do no harm to count upon both. 2 Stra. 1066. 4 Bac. 638. 656.

If an indictment for an offence at C. L. concludes with *contra formam statuti*, this concluding may be rejected as surplusage. The rule is laid down generally. I conclude however that they could not be thus rejected on special demurrer tho they might be on *quarto* or after verdict, for any redundancy is ill on special demurrer however unimportant. 5 T. Rep. 162. 8 M. 362. 3. Com. Dig. 26. Com. Dig. Act. H. C. 2 Hawk. Ch. 25. sec. 115. 116.

Exceptions in the enacting clause of a stat. must always be negatived in a demurrer or complaint founded upon it. But exceptions qualifications or provisos in a substantive clause need not be negatived, indeed no notice need be taken of them. 1 Burr. 153. 1 T. Rep. 441. 5 ib. 83. 7 ib. 27. 8 ib. 542. Doug. 331. 1 East. 646. 6 T. Rep. 559. 1 Bam & Ald. 96. 362. 1 Ch. P. 229.

This distinction may appear arbitrary at the first impression but it really is not so. the ground of it is that when the exception is in the enacting clause it is a part of the description of the offence which cannot be properly described without reference to it. but when it is in a substantive part it does not constitute part of the offence & is only to be noticed by defence if he thinks proper in his defence. Thus we have a stat. enacting that no secular business shall be executed on the sabbath except works of necessity & charity. Every complaint thus must negate the exception. The stat. also contains a substantive clause enacting that all prosecutions under it must be commenced within one month after the transgression this constitutes no part of the description of the offence but may be used by defence in his defence if he sees cause. Esp. 300. Ray. 65. 3 Johns Rep. 412.



I have already observed that when there are two subsisting remedies, one by 3. L. and an accumulative one by Stat. either may be pursued. Innumerable instances have for the purpose of introducing another viz. If in such case the 3. L. pursues the 3. L. remedy and does not succeed by reason of not complying with some requisite he may resort to the 3. L. Union if he makes out his case at C. L. and this rule holds as well in public as private prosecutions. Salk 212. 2 Bl. Rep. 900. 1 Hawk 211. 2 ib. 312. 356. 2 Keb. 138. 5 T. Rep. 169. 2 M'Nally 493. to 495. 2 Hawk 191.

As to criminal prosecutions the rule was formerly otherwise. see Cro. Eliz. 231. 307. 697. 5 Co. 99. 2 Hale 71. 170.

If that which was no offence at C. L. but is made one by Stat. and a particular mode of prosecuting for it is prescribed by the Stat. that mode and that only it is said can be pursued. Hence if a Stat. creates a new offence & provides that it is to be prosecuted by information, no prosecution of another kind as by indictment will lie. so if by indictment is the manner prescribed. Cro. J. 644. Salk 45. 7 Co. 36a. 2 Bur. 803. 805. 834. 2 Bur. 2323.

This rule however is to be taken with several exceptions more cases coming under its exceptions than under the rule. indeed there are but two classes of cases to which the rule applies. 1<sup>st</sup> When the particular mode of prosecuting is prescribed in the prohibitory or enacting clause that mode only is to be followed.

2<sup>d</sup> When there is no prohibitory clause properly so called. But the Statute merely enacts that the doing an act

not punishable before, shall, for the future be punishable in such & such a particular manner, then it is necessary to pursue such particular remedy 1 Burr. 5 Ld. 5. 2 ib. 803 to 805. 4 T. Rep. 205. 2 Hawk 302. note.

The reason seems to be that the offence & remedy created together are so blended that they cannot be separated in the prosecution & therefore it is presumed that the legislature intended that this mode only should be pursued.

If the particular mode of prosecution is prescribed in a substantive clause, the rule does not hold and the offender may be prosecuted in any proper C.L. mode. Suppose a stat makes a private nuisance a public offence which by C.L. it is not and in a substantive clause enacts that it shall direct a particular mode of prosecution. now as this is in a substantive clause the offender may be punished by indictment or any other C.L. mode, for it does not oust the ancient remedies. 4 T. Rep. 205. 2 Hawk 302. note.

and if that which is prohibited by stat was before an offence at C.L. & the stat. remedy is only cumulative, it is plain from the former rule that the C.L. remedy may be followed. For there was a remedy before the statute was made & the one by C.L. is not to be ousted by implication. 2 Burr. 803. 805. 834. 4 T. Rep. 202. 2 Hawk 302.

If a statute creates a right or an offence & prescribes no remedy or sanction the C.L. will lend its aid to enforce the right & to punish



the offence. & the prosecution is for a misdemeanor. Such the stat says only that no person shall be permitted to do such an act. The C. L. prescribes the remedy & the punishment, for it is a misdemeanor at C. L. to disobey a statute. 1 Burr. 544. 3 Liv. 290. Doug. 425. 10 Co. 75. Cro. Eliz. 655. 6 Mod. 26.

If a civil remedy in such a case is to be sought, it is said to be by an act of the stat. but this appears to me incorrect. the right is furnished by stat. but the punishment or remedy is at C. L. there is no stat. sanction in the case. 4 Burr. 653.

Obstructing the execution of powers vested in certain persons by stat. is an offence at C. L. & the complaint must not be sought not to count when the stat. at all. the offence is against the C. L. & not against the stat. this providing that those persons shall execute certain powers, that involves disobedience or opposition to the laws. the prosecution there must be as at C. L. Doug. 425.

### Of the persons who may prosecute on a penal st.

It is a general rule and indeed a first principle in jurisprudence that when a wrong is done the remedy appertains to the party who is injured by it. therefore a public offence is never to be prosecuted by an individual in his own private right or capacity, for the remedy belongs to the public who are injured. 2 Bl. 24 to 7.

It may be necessary here to observe, that a public offence may & very often does include a private injury. that is the act out of

which the public offence arises is an injury to an individual. When it is said therefore that a public offence is not to be prosecuted by an individual, it is not meant that any action will not lie against the offender for a private injury. ~~suffered~~ it only means that he cannot prosecute for it as offence against the public. he can prosecute for the civil injury.

But notwithstanding the general rule we find that private persons do prosecute in Eng for the King & in the Kings name altho the law giving them no part of the property, but they always prosecute in the name of the King. the record runs thus. the King on the information of A. B. vs. C. D. & I find this practised in Eng. even in cases of felony, but it is not so in Am. for examples 2 T. Rep. 47. 190. 198. 205. Leach vs. Bass / paper 231. 3. v. 2 Bac. 508.

There is a mixed species of prosecution partly public & partly private called *qui tamen* from the latin form of the complaints it is commenced & carried on always by an individual who prosecutes as well in behalf of the King, or public as of himself *qui tam pro Dom. no rege quam pro seipso* 4 Bl. 208. 1 Bac. 37. 3 Bl. 162. Com Dig. Sup. etc. St. C. 1

One remark I would here make of a fact which has not been quite attended to. that the individual prosecutes alone tho in behalf as well of the King, or state as of himself. This tho it may seem unimportant, is practically of great consequence. The King, or state are not in these cases a party tho they may reap the benefit of the prosecution.



There is a great deal of confusion in the books arising from this that the proper distinction has not been made between *qui tam* actions and *qui tam* informations or prosecutions.

A *qui tam* information or complaint is accompanied with a *forthwith* process or a proper criminal arrest. — But a *qui tam* action is commenced with a writ & declaration by civil process, and is indeed nothing but a civil action like that of debt. 3 Bl. 161. 2 L. Bl. 308.

An action thus brought by an individual in his own right, as a *penal* stat. is a civil action being carried on by writ & *deci.* It does not follow then that because the action is founded on a *penal* stat. that the action itself is *penal*. The character of the action depends on the form it assumes at its commencement. Thus an action brought to recover the Statute penalty against a bribe is properly an action of debt and a civil action. Cowp. 382. 1 Wils. 125. 3 T. Rep. 448. 4 T. Rep. 756, 758 & 7 T. Rep. 257.

This distinction is not merely nominal for it is of great practical importance. The incidents of a *qui tam* action and of a *qui tam* prosecution or in other words of a civil action and of a criminal prosecution being very different. For in civil cases the Def<sup>t</sup> is entitled to 15 days notice, a criminal process is *forthwith*, in the former he pleads his *alibi*, in the latter in propria persona. The record in civil cases is amendable by the stat. of *amend<sup>ts</sup>*.

in criminal cases it is not. In civil cases the affirmation of a Jurator is admissible in Eng. in criminal it is not. - In Lon. all criminal cases are appealable from a single magistrate and only a particular class of civil ones. from the county courts no criminal cases are appealable tho many civil ones are. the jury are judges of the law in criminal cases in civil they are not. --

Qui tam prosecutions are founded on a penal statute generally to recover a penalty or forfeiture of some kind indeed qui tam prosecutions, whether by action or information as now understood, are considered and treated as the creatures of penal statutes. for a qui tam prosecution properly so called was a thing hardly known at C. L. there is said to have been such but there are few or no traces of them. they are to be considered then as the creatures of the statute. 4 Bl. 308. 2 Hawk. 377. 1 Roll. 1. Cro Eliz. 877. 3 Co. 360. 532.3.

A popular action is one given to any person who will sue for a penalty incurred by the violation of some penal statute. It is called popular because it is given to the people at large. 3 Bl. 160. 2 Bl. 437. - In some cases the whole penalty is given to him who will prosecute tho usually it is but part. Com. Dig. act. H. C. 1. 3 Bl. 161. 2 Hawk 265.

A popular action is not necessarily a qui tam action tho they are almost universally confounded. for when all the penalty is given to the prosecutor he may sue in his own name solely tho it is said in some of the



look, that the suit may be not qui tam win. But I do not see the propriety of it in such. when the public has a part it is undoubtedly proper. from what is said in Bacon & Hawkins it would seem that the qui tam form might be followed. -

Ad qui

tam action is not necessarily popular for there are cases in which the right of a qui tam action only accrues to the party injured than the prosecutor must see qui tam win as the pen. atty. is divided. On this subject the books are very indistinct. Com. Dig. A.C. H. E & F 3 Bl. 161. 1 Bac. 37. 2 Hawk. 377.

Having explained the nature of these two actions, it is necessary to enquire in what cases an individual may sue upon a penal stat in his own name. And it is a genl. rule that if an individual is civilly injured by an offence against the statute he may have a private remedy on that st. altho it does not expressly give him, yet it does imply. Com. Dig. A.C. Stat. a. 1. 4 Bac. 653. 10 Co. 75. b. and this although the stat is penal.

Another general rule is that whenever a stat. enacts or prohibits anything for the protection of individual rights, the individual injured may have an action on the stat for the injury by implication altho the stat is penal & no remedy is expressly given. These rules appear to be pretty much alike but I give them as I find them. 2 Hawk. 377. 4 Bac. 653. 6 Mod. 267. Com. Dig. A.C. H. F.

When a stat. inflicts a penalty on any one for dispossessing another of his right without appropriating the penalty at all. he who is injured & not the King or public, is entitled to the penalty. Thus the statute prescribes a penalty for not setting out tithes. the penalty goes to the party injured who has a right to the tithes.

An act lies upon the stat at C.B. it is said, this literally implies an absurdity. I take it however to mean, that the party has a remedy at C.B. supplied to enforce the right afforded by the st. & thus understood the rule is true. 3 Lev. 290. 1 Inst. 159. Com Dig. Act. St. F.

In these latter rules I have been considering how an individual can prosecute on a stat. in any form. I shall now consider those cases in which one individual may prosecute *qui tam* or sue in a *qui tam* action on stat. To show it is a general rule that if a stat gives a penalty or part of a penalty for an offence immediately injurious to the public only to any person who shall sue or prosecute for the offence. anyone may have a *qui tam* action on the stat. What the reason is for making the action *qui tam* when all the penalty goes to the prosecutor I do not see.

The rule is the same if a fine is given to the King or public & a sum certain to the person who prosecutes. for it is only a different mode of dividing the penalty. 1 Bac. 37. 4 Co. 13. Dyer. 95. Com. Dig. Act. St. E. 1 & F.



Now if the inquiry arises how these rules are reconcilable with the genl. rule before laid down, that for a public offence the public only can prosecute, it is to be observed that that is a rule of the C. L. & that these are rules introduced by stat. no tautology in derogation of it.

But if a penalty or part of a penalty or some benefit be not given to the person who shall prosecute, no individual can prosecute for an offence only injurious to the public, and it is of such offences you will observe that I am speaking, 1 Bac. 37. not. 2 Hawk. 265 or 377.

But on the other hand if a stat. prohibits an offence immediately injurious to an individual as well as to the public and expressly gives to him a penalty or part of one or damages he may bring a quia tam action. Thus our stat. for preservation of the peace inflicts a fine upon the offender and gives damages to the party injured, who may recover them in a quia tam action. 1 Bac. 37. 2 Hawk. 377. 4 Co. 13. a.

If a stat. expressly allots a penalty to the party injured by the offence he may sue for it alone in his own name without joining with him the King or public. there is no need of prosecuting quia tam wise. Com. Dig. ac. stat. &c.

In genl. when a fine or penalty of any sort is given to the public and a civil remedy to the party injured by the offence, the fine is inflicted of course upon conviction in a civil suit.

the the action was in the stat or an act of trespass & not  
 qui tam. This is analogous to the old capitatio pro  
 fine. 2 Bac. 11. 5 Bac. 191. 193. 2 Bac. 506. Salk 636.  
 Carth. 390.

When no form of action is prescribed for the  
 recovery of statute penalties the most usual, as well as  
 most appropriate is an action of debt. The theory of  
 the law is this. when a stat provides that the transgressor  
 of it shall pay \$100 to the individual who shall pros-  
 ecute. the commencing this action to recover it makes  
 the offender his debtor in consequence of the implied  
 engagement of the social compact. 3 Bl. 160. 161.  
 Cor 175. 4 Bac. 653.

It has once been determined in Ct  
 that in debt. Ap<sup>t</sup> would lie to recover the penalty but  
 it is 20y<sup>r</sup> since & no attempt of the kind has since  
 been made. I think the decision approved to the rules  
 of the C. L. Exp. Dig. 7. Sect 92. 2 Lev. 252.

If a pen-  
 ally is given by stat partly to the King & partly to the  
 prosecutor the King or public may prosecute & recover  
 the whole. 3 Bl. 162. 2 Hawk 392. 11 Co. 65.b. 7 T. Rep 536.  
 The reason is that the penalty given to the prosecutor is  
 to induce some individual to prosecute & not by rea-  
 son of a claim he can have before action commenc-  
 ed. on acct. of the public offence. Besides as the  
 King is prosecutor he may be said to take the pen-  
 ally in halves as King & prosecutor. A stat has  
 lately been made in Conn. to give the public the whole  
 penalty when the state att<sup>y</sup> prosecutes it as a re-  
 lief.



in as much as the law remains as it was before  
 4 Cow. lib 2. pp. 164. 182.

et Bona fide conviction or  
 acquittal on a *qui tam* prosecution is a bar to any  
 other prosecution even public for the same offence  
 or the offender might be twice tried & punished  
 for the same offence. so is a release from the party  
 aggrieved or a common informer after conviction. &  
 the same rule holds as to convictions or acquittals  
 in public prosecutions: they bar all subsequent  
 actions. 3 Bl 261. 2. Cro J. 480. 2. 11 Co. 65. 6. 1 Bac.  
 41. 2 Hawk. 276. 392. Conn. Dig. Act. Stat. C. 2.

The rule  
 you mention requires the conviction or acquittal to be  
 bona fide. this is to guard against sham prosecutions  
 by the friends of the offender, tho' when the pro-  
 secution is by the public there is no presumption  
 that it is not bona fide, then can be none.

This pendency of a *qui tam* prosecution may be  
 pleaded in abatement of a subsequent public prosecu-  
 tion for the same offence. for a man is not  
 to be prosecuted twice for the same offence. It  
 is said that it may be pleaded in bar by Lord  
 Hob. but D Mansfield says no. I think correctly  
 that it must be pleaded in abatement. 2 Hawk.  
 391. 3 Bur. 1423. For D Hob. rule. see Cro Eliz 261.  
 Hob. 209. 1 Roll. Rep. 49. 134.

et person claiming  
 a penalty or sum of money under a statute.

has no right attached in himself till suit commenced. by commencing he requires an inchoate right to the penalty which is consummated by judgment. before a <sup>trial</sup> verdict it is *indivisi* faciens to which no individual has more right than another. after it the promotor is exclusive seiser of the right of recovery. You will observe that I speak now of penalties given by popular actions: as to individual actions the rule is otherwise. - 2 Hawk. 391. 2 New Bl. 310. 2 Bl. 437. 2 Lev. 141. 3 Bur. 1423. 2 Stra 1169.

I repeat that it is an essential part of this rule that the penalty be given to any one who will prosecute. Next to the party aggrieved. Since the King may totally bar a popular action by a pardon or release before its commencement. but after he can only release his part of the penalty. So the State ~~Att~~ may issue a writ <sup>prosequi</sup> for the public part of the penalty.

2 Hawk 392. 275. 2 Bl. 437.

11 Co. 65. b. Hutton. 82.

It is said that parliament can release the whole penalty after a <sup>trial</sup> verdict. it is indeed hard to say what our Eng. Par. cannot do. but I should think this beyond their power for it is a thing directly against the first principles of jurisprudence. The only way as I take in which they can release the penalty is to repeal the statute. 2 Bl. 437.

The King cannot, even before a trial verdict.



bar the suit of the party injured by the offence  
when the penalty or part of the penalty is given  
to him. For it is a mere matter of justice to him  
if he has a right to this penalty even antecedent  
to the action commenced. it is a remedial act<sup>n</sup>  
and nothing but a repeal of the stat will bar  
it. 2 Hawk 392. Moore 58. May 100. 2 Hen Bl.  
311.

It seems that at Ed the prosecutor on a penal stat.  
in a popular action may release his part of the  
penalty after conviction. the before such conviction such  
release would be of no avail even at C. L. as to  
securing immunity to the offender. for the prosecutor  
right to the penalty is not consummate until  
conviction. 2 Hawk 392. 2 Roll Rep 38.

By a stat of  
4 Hen. 7 it is enacted that no conviction arising  
upon a popular action shall be a bar to a subse-  
quent prosecution for the same offence. & no re-  
lease pending the action is under this stat of  
any avail. this regulation you will perceive is to  
prevent collusion between the offender and prosecutor  
to the detriment of public justice. 2 Hawk 392  
3 Bl. 162.

It might however be made a question whether  
this stat was necessary and when there is no such stat  
as here it might be a question of some consequence  
it raises a question as to the nature & operation of  
fraud. the question also involves the nature & authority  
of records. 1 Bur. 395. 3 Co. 77. Vin. Abq. Tit. a. et.

By stat. 18<sup>th</sup> Eliz the prosecutor cannot compound the prosecution at all until after answer in court nor then without leave of Ct. in pain of pillory and other penalties. & it is matter of discretion with the court to grant or refuse leave. We have no such stat in Ct. and a question analogous to the one just mentioned might be here started. 1 Bac. 43. 2 Hawk 397. 1 B&P 18. 5 T. Rep 98. Stra. 167. 1 Wils. 79. Com. Dig. acq. H. E. 1. and when leave to compound is thus given the part of the penalty belonging to the King or public must be paid into court this is always the condition. 4 Burr 1929.

But it seems that leave to compound is never granted except on proof of Dept<sup>y</sup> poverty. 2 Burr. 1929. Com. Dig. acq. H. E. 2. Stra 167. Barnes notes 462.

And even a bona fide release would not at Ct. when made by the prosecutor, bar the King's right to part of the penalty so if the prosecutor was paid. But a bona fide release <sup>after conviction</sup> even without leave of court would bar an action for the same offence brought by any other individual. 2 Hawk 275. 392. 11 Co. 65. 6.

If the Def<sup>y</sup> in a proposed action dies, releases, withdraws, or suffers a nonsuit, the public prosecutor may at his election proceed on the same complaint or commence a new prosecution. 2 Hawk 392 3. 11 Co. 65. 6. 66. a 5 Co. 48. b. 3 B&L 162.

But when the action is given to the party injured & he dies or releases pending the



the suit or suffers nonsuit. the King cannot proceed in the prosecution for the Peffs part cannot go to him, neither can he prosecute for the Peffs representatives. 2 Hawk 392. 3. aboon 58. c. 100.

If so.

real persons are convicted on a popular prosecution only one penalty is inflicted upon the whole for one offence, not one upon each.

But if several are convicted of an offence against C. L. or a penal Stat. in a public prosecution the penalty is inflicted on each & when the same is precise, that precise sum is inflicted on each. The reason is, as it is said, that the qui tam action is the same as for debt and a recovery is a satisfaction, but in case of a public prosecution the penalty is by way of punishment. Now Statute this theory in accounting for the distinction between a qui tam action & a public prosecution to be incorrect: for the penalty is not intended as a satisfaction since the action may be lost by one who is not injured at all by the offence. *unintelligible* May 60. Cro. Eliz. 280. Salk 182. D. & P. 189. Corop. 610. 4 Burr. 2026. 2 Cow Rep.

The truth is this distinction is founded in the different forms of the prosecutions. In an action for the penalty sounds in debt, if then it is lost, agt then they are charged as debtors to the amount of the penalty, and as the form is that of claiming a debt, then can be but one penalty recovered. Whereas upon information or indictment, the proceeding is in

form and substance a criminal one, founded upon the offence only & expressly. It does not bring into view anything in the nature of an implied contract. it is the prosecution of a crime & criminal as such, not instituted for the recovery of an implied debt arising out of it. If this is the true reason the rule is evidently correct. Debt, you will observe, are joint & crimes several. 2 East. 569. 5 D. & J. Rep. 809. 1 N.B. 245. 2 Mass. R. 137.

On the other hand I would observe that several acts may constitute but one offence tho' there are cases in which one and the same act constitutes several offences. When then there is but one offence the penalty must be single. altho the prosecution is public. Thus in a prosecution before the Kings Bench for a breach of the sabbath laws. it was contended that the several acts which Def<sup>t</sup>. had done in the course of the days work were several offences. but the Ct said not, and inflicted but one penalty. So in Battery the continued acts constitute but one offence. Cowp. 640.

Indeed there is an essential difference between the acts complained of and the offence imputed to them. the physical act requires no definition. it is the bare transaction. the offence is the character which the law attaches to it. Hence it is said that one act constitutes several offences and several acts but one offence.

In Eng. the Plff. in a popular action is entitled to no costs unless they are expressly given him by the St. But when the penalty is given to the party injured



he is entitled to costs upon conviction, for what he recovers is in the nature of a satisfaction for the injury done him & he is as much entitled to costs in this case as in any civil action. But he who sues in a popular action is not supposed to have suffered any injury, and does not recover by way of satisfaction. 1 Bale 42. 511. 519. 2 Vent. 781. Salk. 206. 1 Ann. Pl. 10. Mullock's law of costs. 19. 200. 201. 2 Hawk. 274.

In bon<sup>ty</sup> the prosecutor always recovers costs when he recovers judg<sup>t</sup> and always pays them when judg<sup>t</sup> goes against him as in other civil cases.







Of Master & Servant. — A servant is any one who is subject to the personal authority of another, a master is one who exercises that authority. To constitute this relation then the authority exercised must be personal, so that subjection to the civil authority is not servitude, neither is subjection to a magistrate or civil officer, any more than obedience to the laws.

This authority of Master over the serv<sup>t</sup> is generally founded in compact, but not always. I say not always, with reference to a certain species of serv<sup>t</sup> not known to C. L. the foundation of whose subjection is not compact but force, as the slaves in some part of the U.S. & formerly in Ct. Debtors were the slaves of their creditors if they could pay in no other manner. — yet C. L. however all servitude is founded in compact.

There are Five

species of servants known in Court & in most of the other states. 1<sup>st</sup> Slaves. 2<sup>d</sup> Apprentices, 3<sup>d</sup> Menial serv<sup>ts</sup> 4<sup>th</sup> Domestic labourers. 5<sup>th</sup> that class of qualified serv<sup>ts</sup> who come under the general denomination of Agents, such as Factors, Brokers, Clerks, Vendue masters, Attornies, Ship masters, Stewards, Bailiffs and indeed whoever sustains the quality of Agents. 1 Bl. 423. 427. 1 Will. 464. 469. As to the first class they are entirely unknown to C. L. 1 Bl. 423. 1 Will. 468. Galt 666. a leading case on this subject is in 10 Pt 1. the only case I can now quote from that book.



It has been doubted by distinguished lawyers whether slavery has ever been legalised in Eng. the Pennepo Inu could find room to doubt. There have been two cases in it when the servant set the master at defiance the struggle however was terminated by a compromise. Slavery in order to be lawful must be grounded either in Statute Law, Common Law or Local regulation.

It is no longer a question whether slavery can be justified by natural law. The subject is very well discussed by Blackstone, but the day of discussion on that subject is over. 1 Bl. 423 & onwards.

In the second place it is perfectly plain, that slavery was not known by C.L. & the local laws of any foreign country can never be enforced in Eng. Indeed it is a maxim of the Eng. Law that a slave upon landing becomes ipso facto free, and is protected in the enjoyment of personal liberty and other privileges of freeman. Doct + 1. Salk 424. 666. 1 Inst 79. b notes. The case in Doct was where a West India gentleman took his slave on board ship in the Thames, a writ of habeas corpus brought the slave before the C.R. when after solemn debate he was set free.

There were indeed villians in Eng. but they were not absolute slaves the Lords not having that authority over them as is now exercised in many countries. The villians were the abridgers of the Lord, and plagued with it. This slavery signifies in the tenure by which the villians held their land

And when that species of tenure was abolished by the 12 Ch. 2. the slavery incident to it was annihilated of course with it. Indeed the character of villenage was hardly known in Eng. in the age of Elizabeth & it is said that at the enactment of the st. of 21. there were but two villenages in Eng. 2 Bl. 94. 96. Loft. 8. Littleton sec. 189. 194. 204. See also an excellent acct. of villenage in 3<sup>d</sup> Runes Eng. 307.

The only remaining question is whether slavery has been legalized by our own local regulations. and of this there appears to me to be no question. — We have no statutes directly establishing the relation of Master & slave but it has always been known & practiced amongst us so that we have not only the long acquiescence of the Legislature, but we have stat. counting upon the existence of slavery, inflicting appropriate punishment upon slaves, obliging masters to maintain them, and what is instar omnium we have one stat. that prescribes the manner of emancipating them so as to relieve the master from future liability as to their support. Now we have not half as much law to show that a man owns his own house. St. Conn. 625.6 Some of these are repealed it is true but that does not hurt the argument.

Our Sup<sup>r</sup>. Ct. has repeatedly recognized the existence of slavery tho we have few or no reported cases of this kind they are however within the memory of every middle aged man. 2 Root. 364. 517.



It has indeed been decided that the master cannot maintain trover for his slave, for it is impossible for the master to have that absolute property which is necessary to support that action. This however proves nothing, and an act. would lie for enticing away a slave as it would for enticing away an apprentice. It has been decided too that they may be sold & also taken in Execution Talk 366. 2 Ray. 1274

But strict slavery has never existed even practically in law, for the master never had power over the life of his slave. A slave might hold property even for it by his next friend. He could even sue his master.

It has been determined by our Sup<sup>r</sup> Ct. that the marriage of a slave by his master's consent is an emancipation, on the ground that the relations the slave has contracted with the consent of his master are not compatible with a state of slavery. We find nothing in the Eng. books precisely to this point but there is something analogous in the emancipation of minors. 3 T. Rep. 356. Bl. 511. 3 Bac. 547.

As to the marriage we find an analogy in the case of nups. i. e. female villains. A nup it is said is emancipated by marriage to a feudal villain, the master's consent is not in the rule, if it had been it would probably have appeared. Litt. sec. 187. 2 Bl. 93. 4.

But on

the other hand a nup is at all emancipated during

custom if she marries a freeman. & for one if she mar-  
ries her master. 1 Inst. 123. a. note 3. 136. b. 137. b. Perkins. sec-  
tion 312. How far these analogies will have operation  
upon the question arising in the marriage of a slave I will  
not undertake to say.

But it has been a question whether  
the illegitimate child of a slave is a slave. By the  
civil law it would undoubtedly be the case if the  
mother were a slave for the maxim of that  
law is *partus sequitur ventrem*. According  
however to the Feudal or Eng. law the child follows  
the condition of the father, as then a bastard is in  
law considered as fatherless it follows that under  
the Feudal law a bastard could not be a villain  
by birth. — In bon<sup>ty</sup> & I suppose throughout the  
U. States the civil law maxim prevails. 2 Bl. 93. 4  
Let see. 187. 8.

Slavery is now nearly abolished for by st.  
those born between 1784 & '97 are free at 25 those born  
since '97 at 21. St. Con. 625. 626.

The importation  
of slaves from foreign countries is now I believe pro-  
hibited by the stat law of every state in the Uni-  
on. the transportation from one state to another  
has not been prohibited until lately.

Offenders may  
be judicially condemned to slavery for the commis-  
sion of crimes. As confinement to hard labour in  
Newgate. This however is a qualified civil slave-  
ry: the master is the organ of the law. & the slave



is a slave to the public

Servants of the second class are called apprentices, from the french word *apprendre* to learn. because they are most usually bound to learn some art or mystery of their masters who are professors of the mechanic arts. Tho they might be bound as menial servants or as apprentices to husbandmen. 1 Bl. 426.

By the Eng stat. 5 Eliz every apprentice must be bound by deed and indenture to create the legal relation of master & servant. a parol contract under this stat is not binding. 1 East 68. 6 Mod. 182. 2 Ray. 1117. 4 Bac. 558

A defective instrument or contract of apprenticeship cannot be construed into a hiring by the year. not being such of itself. 8 T. Rep. 379.

It has been said that the relation cannot be created to retain the abh. unless the word apprentice is used. but it is not so. and if the intention is to retain it is sufficient. 4 Bac. 557. 1 Burn. Jus. 57. 8 T. Rep. 379. 1 East. 533. 4. & all other servants may be retained by parol contracts. 4 Bac. 546. 557.

From our own Stat. 3 and 4 Geo. 4. stat. authorizing the overseers of the poor with the aid of the justices to bind out the children of paupers. these st. have no authority. from and are of no effect except by analogy to statutes of that kind enacted by our legislature. 1 Bl. 426.

We have certain similar stat. authorizing the  
 select men with the justices to bind out the chil-  
 dren of paupers. males till 21. females till 18. H.  
 Con 123. L. 552.

All servants & apprentices  
 are regularly entitled to wages of course, unless there  
 is an agreement to the contrary. — In bond all wa-  
 ges are settled by contract. So is the Law in Eng.  
 as to menials. — But the wages of those employ-  
 ed in husbandry is settled by the Statute. We have nothing  
 of that with us. 1 Bl. 428.

Apprentices are regular-  
 ly and prima facie entitled to no wages. They may be  
 entitled to them by contract, the law however implies no  
 contract of the kind. 8 T. Rep. 379.

By Stat. 5 Eliz. ch. 4. it is  
 enacted that minors may bind themselves by indenture of  
 apprenticeship. But with such strictness & caution have  
 the courts construed this stat. with reference to the priv-  
 ileges of infancy, that it has no other effect, than, while  
 the relation exists de facto to give to the parties respectively  
 their relative rights & duties. but the minor is not at  
 all bound by his contract and he may determine the  
 relation when he pleases. If however he serves his term  
 he becomes free of his trade with every right & advan-  
 tage of a regularly indentured appr. Cro Eliz. 179. 448.  
 Cro J. 297. 1 Bl. 426. Doug. 501. 518. 5 T. Rep. 716.

We have no such stat. as this but if the father or guar-  
 dian joins with the infant in the indenture at all  
 he is bound by it —



And it is laid down generally that the father or guardian in such case is bound for the non performance of what is stipulated to be performed by the app. 8 Mod. 190. Doug. 501. 518.

In ellap. it was determined that the father &c. is not thus bound when the instrument is in common form, to answer for the non performance of the covenants entered into by the app. If however he binds himself by a sweeping claim or covenant specifically guaranteeing the performance. he is bound. 2 Mass. Rep. 228.

This I confess appears a very questionable point. for I do not see the use of these covenants unless the parent is bound by them. — the minor is evidently not bound by them if then the parent is not the instrument is perfectly negative. I suspect in that case observed that the signature &c. of the guardian attests his consent only, that the boy might bind himself. —

The master forfeits his rights by abuse of the app. hence it is laid down that misuser is good cause of departure. This rule is necessarily indefinite and I do not know but it is as definite as it can well be, and each case must be determined by its own particular circumstances: an app. ought not to be bound to suffer gross & reiterated abuse neither ought he to be allowed to leave for a trivial cause. there is room for the exercise of judgment by the court & judge 1c & 4th 518. 1 Bl. 426.

It is laid down in the books that an app.

can be discharged no other way than by deed. *Id.*  
*Ray.* 1117. 3 *Bac.* 546. *Salk.* 68. 6 *Mod.* 182. which I  
 consider as meaning that the contract is to be dissolved  
 in the same manner as it was created. *colligimus*  
*pro ligatur.* I state it that an agreement not executed  
 will not amount to a discharge unless it is returned  
 by deed and if a parol license was given to depart  
 the master might retract any time before depart-  
 ure, but if the app. leaves before retraction he will  
 not be liable nor his guardian in the covenants  
 of the indenture. so I state it that an ag<sup>t</sup> might  
 be binding tho by parol. 8 *T. Rep.* 109. 10. *Bur. settl.*  
*ments case* 542. 1 *Day* 153. 3 *ib.* 126. 1 *East.* 619. 630  
 1 *T. Rep.* 638. 2 *Hen.* 136. 574.

again concerning the  
 indenture or delivering it up for that purpose  
 discharges the app. an ac<sup>t</sup> may be put upon an  
 instrument when lost or destroyed accidentally but  
 when with animus revocandi it is inevita-  
 bly gone. *Itra.* 582. 2 *Bl.* 308. *Bur. sett. ca.* 511. 274

It has been said that the testimony of the master ip-  
 so facto discharges the app. it is not so. the court  
 however which has authority in such matters  
 will grant discharge the app. in such case on  
 application. *Itra.* 582. 1 *ctth* 149. 4 *Bac.* 550.

The court which the power of discharging app. is  
 the 6<sup>th</sup> of Common Pleas. it is given them by our  
 stat. that 6<sup>th</sup> can discharge an app. for default of



the master & punish at discretion the bad conduct of the app. H. Con. 488. 294. The power of our C<sup>t</sup>. of C. P. is very like that of the C<sup>t</sup>. of Sepims in Eng. 4 Bac. 566. 1 Bl. 426.

If an app. marries without master's leave, the master cannot for this turn him away, but he may have his remedy in the covenants of the indenture. The app. usually covenants not to marry without leave, but I presume the rule would be just the same if he did not. 2 Vern 492. 4 Bac. 578.

A contract of apprenticeship is what is called in law a fiduciary contract, that is one founded on the personal confidence of the parent & minor in the master, for this cause the master cannot spurn the app. Indeed such fiduciary contracts, generally, are not spurnable, nor the rights growing out of them. By the custom of London an app. may be spurned but I trust we have no such custom or law here. Hob. 134. Salk 68. 12 Mod. 553. Doug 67. 1<sup>st</sup> Wils 250. 3 Wils 519.

An award of arbitrators that an app. shall be spurned is void unless by consent of the app. or custom of London. Stra 1267.

But the at C. L. the spurning does not pass the right & interest of the master in the app. still it is a good contract between the master and his spurnee. So if the app. does not serve the spurnee the master is liable on the covenant. The app. cannot be compelled to serve, but if he serves he

acquires the same rights as he wd have done by serving his master as becoming free of his trade. The assignee can maintain no action on the original indenture. 2d Ray 683. Salk 68. 1 Str 496. Doug. 69.

Upon the same principle that the master cannot assign, he is bound to keep him under his own care and not to transfer his authority or government to another, nor can send him abroad even to improve him in the art or trade unless the contract so expresses it, or the nature of the business requires it. Hob. 134.5. 8 Mod. 236. 12 Mod 446. 4 Bac. 577.

Upon the same principle again, the representatives of the master cannot hold the app. for the contract was fiduciary founded on personal trust or confidence, the rights of which are not transmissible. 2d Ray. 683. Sta 1267. 2 Hy. 35. Salk. 68.

And as the representatives on the death of the master bound to teach the app. according to the master's undertaking. It was once determined that the Ex<sup>r</sup> was thus bound. 1 Lev. 177. 1 Sid. 216. but that decision was contrary to the principles of fiduciary contracts and afterwards denied to be law & overruled. 2 Sta. 1267. Wat. L. Partnership 296. Salk 66.

Whether the master Ex<sup>r</sup> are bound to furnish board, cloathing & necessaries after master's death during the time for which he was to serve is a *questio vexata*, according to the



current of authorities he is liable. Now this covenant as to necessaries &c is not strictly fiduciary. If app. gets them it is no matter how they are given as an equivalent for services. If then the app. can leave his master's shop immediately on his master's death and still be entitled to receive his support. He gets it plainly without giving any thing for it. 3 Salk 41. 1 Tub. 761. 820. 192. 216. Cro Eliz. 553. So in Con. 1 Day. 30. in that case however the master bound his Assent & Bac. 579.

The Eng. the 6<sup>th</sup> of 647 has ordered the premium to be restored when the master died soon after indenture made. This appears equitable, but it would not if the Ex<sup>or</sup> of the master were also bound to support the app. — That court too ordered a large premium to be returned when the parties had calculated for such contingency & agreed on a much smaller sum. This appears like an enormous stretch of power and neither more nor less than making a new contract for the parties. 1 Vern 460. Finch. 396. 1 Attk. 149.

Go also

if a master who has received a premium, turns away an app. He may be compelled in Equity to restore a part of it. even tho the app. was turned away for a good cause. — I should suppose that the whole should be restored if the cause was an improper one. 2 Vern. 64.

Go also when the master who had rec<sup>d</sup> a premium becomes bankrupt & thus the relation destroyed a part of the premium was re-

stored in Equity 10th 149. 3 Bac. 566. 7.

stud in Eng. when the justices at the sifions discharge an app. they order a restoration of the premium or a part of it. This seems a g<sup>t</sup> law for they have no equitable authority general acquiescence however has made it law. Our courts do not interfere with the premium. 1 Bl. 426. Salk. 67 490 1 Saund 314. 11 Mod 110.

Whatsoever an app. earns by his labour during the term of the apprenticeship belongs absolutely to the master, and even although the apprenticeship is merely de facto. Stra. 582. 1 Inst. 117. note. 12 Mod 415. 1 Vy. 48. 83. 6 Mod. 69. Salk 68.

It follows then that property of any kind earned or acquired by an apprentice may be taken possession of by the master whenever he can find it or he may recover it by proper course of law, as if his wages are withheld. ib. anc.

And this rule holds as well when the service was performed without as when with, or whether it was in the immediate line of the master's business or not. as if a rove master's apprentice should work a few days for a husbandman in harvest. 1 Vy. 83. Stra 582. 1 Inst. 117. n. 12 Mod. 415. & ib. anc.

This right however is confined to such property as the servant acquires by labour and does not include that which he obtains by descent, purchase or gift &c. as finding the servant maintained an act of treason for a diamond ring he had found. This rule however as to the price



of services applies to no other class of servants except slaves. for if any other sort of servant acquires property the master has no title to it. thus a married servant or day labourer. If however such servant has left his master's service improperly the master can sue him on his contract, or the employer if he views of such contract. 3 Bac 557. 559. Co 8. 653. 2 Lev 63. 1 Inst. 117. a. 2 Roll. Rep. 267.

If an app. or other servant is induced from the service of his master an action against the party enticing with a *per quod* as it is called. Cowp. 56. 3 Bac 567. And it has been determined that a journey man is within this rule whether he labours by the day or piece. Cowp. 56. 1 Wms 269. note. 3 Term 30.

Now with regard to the form of the action states the principle to be this. that if the servant is taken away by force. trespass with a *per quod* will lie but if by enticing the action ought to be *case*. There is a case of trespass for enticing in Cowp. 55. but I apprehend that to have been a mistake for I cannot conceive on what principle that action will lie. *Woy 105. 2d Ray 1032. 1117. Salk 380. 2 T. Rep. 167. 1 Bl. 429. 3 Bl. 442.*

By the rule of Eng. law. which has been copied by most of the states an *apprentice* may gain a settlement tho a minor in the place where he serves his master or certain length of time. A minor a such cannot gain a settlement. this however is more stat. regulation. 1 Bl.

The rule of our law is directly the reverse for that. expressly provides that no minor can gain a settlement his settlement being with the person who supports him as parent or guardian. and he must be removed if he becomes a pauper. 21 Day. 189. St. Con.

We have a recent statute providing that apprentice or other minor servant who abscond shall be bound after full age to respond all damages to the master if the absconding was without good cause. This is the only state that I know of taking away the privileges of minors & I confess that it appears to me a pretty harsh one. Stat. Con. lib. 2. p. 118.

Servants of the third class are menial servants intra mœnia or domestic servants. I know of but one or two rules applying exclusively to them. It is however a rule of the Eng. law that if the term of service is not ascertained, the hiring shall be considered to be for one year on the supposed equity of the case. 1 Bl. 425. Fitts. 168. 4 Bac. 557. We have no such rule of law here. There are certain other regulations in Eng. as to notice before dismissal &c. which you may see in 1 Bl. 425. 6.

It is a rule that they may be turned away for any act of moral turpitude 1 Bl. 425 Christian notes.

As to day labourers I know of no one rule of law exclusively applicable to them. except such as are created by stat. In Eng. there are many such but they are not



binding him. They provide that all persons having no visible effects may be compelled to labour & the superior inscribes their wages and any one giving or receiving money is subject to prosecution. 1 Bl. 466.

The last class of servants is that genus consisting of what are called agents including factors, brokers &c.

Every agent is in a qualified sense the servant of his employer or principal he is a servant indeed in relation to such acts & such only as affect the property of his employer. 1 Woodd. 469. 1 Bl. 427. edw. 252. 297. 8.

In this case the principal has by no means the same genl. control as the master has over a common servt. but the agent is bound by law to act according to his contract.

The first genl. rule that can be laid down with regard to the rights & duties of agents is that every agent factor or broker ought strictly to pursue his commission for his own security as well as for the advantage of his master, for if he does he is not liable to his principal for casual losses if he does not he is. 1 Woodd. 469. Com. Dig. Much. B.

A factor or broker or even a genl. agent may retain the goods of the principal in his own hands to satisfy a general balance of acct. in his own favour, that is he has a lien upon the goods. But by voluntarily surrendering the possession to his master he loses his lien. for lien in personal property is founded in possession.

and he thus loses the lien with the right upon which it was founded: *Ambl.* 254. 1 *Burr.* 493. 2 *Bl. Rep.* 1154. 1 *East.* 4. 335. 2 *ib.* 227. 523.

And a commercial agent has the same lien upon the price of the goods sold in the hands of the vendor. Thus if the goods were sold upon credit he can require of the vendor to make the payment to him & if after this notice the vendor pays the principal, he may may be compelled to pay it over a gain. *Coup.* 251. 256.

But a Com<sup>re</sup> ag<sup>t</sup> has no lien upon the goods of his principal unless they come into his possession for the principal may countermand the assignment or stop the goods in transitu. 2 *Vern* 117. 1 *Attk* 132. 3 *T. Rep.* 119.

The amount of this rule is this that the goods do not become a pledge until actually possessed for possession is necessary to the existence of a pledge *Com. Dig. Murch.* — These rules you will observe are founded in the *lex mercatoria*. —

If a factor gives more or purchases less than his commission warrants the merchant is not bound. if he sells for less he must bear the loss. 1 *Vig.* 510. *Com Dig. Murch.* 13.

A factor has no right to pawn the goods of his principal for his own debt & if he does the principal may reclaim them from the pawnee. It was said that the principal must tender to the factor the bal due him but it has been decided otherwise & that the pawning of the goods by the factor was



is forfeiture of his lien 5 T. Rep. 604. Stra. 1178. 1 Ann Pl. 362.  
1 B & P 648. Com Dig. Merchant Much. B. 7 East 5

a factor

may sell the goods of his principal in and that is his employment. for merchandizing consists in buying & selling, and the purchaser will hold the goods. The factor may sell in his own name and sue in his own name to recover the price. Now as a gent. rule servants cannot sue in their own name and the reason of this distinction is said to be that the factor has a beneficial interest in the goods. I take the reason to be that as they sell, covenant make bills of sale in their own name they can sue in their own name. Corp 256. 1 Ann Pl. 82. 362. B. & P. 130 1 T. Rep. 112. 2 Esp. Rep. 493. 7 T. Rep 359. 1 Chit. Pl. 5.

The same rule holds as to brokers, policy brokers, ship Capt<sup>ns</sup> & commercial ag<sup>ts</sup> in gen<sup>l</sup>. 1 Chit. Pl. 5. Parks Insurance 403. 1 Ann Pl. 81. 2 ib. 591. 2.

In all the

proceeding cases however the act<sup>n</sup> may be bro<sup>t</sup> by the principal, but then can be but one recovery, inl<sup>g</sup>. as in the case above the factor gives notice to the vendor not to pay the principal. 1 Ann Pl. 81. 7 T. Rep 359. 360 note a. 1 Chitty Pl. 5.

An auctioneer

is not liable for selling goods to the highest bidder tho for a up on them that directed by the owner. for the act of setting up goods is a contract to sell them to the highest bidder. the direction is void to other persons.

up he makes it known to the buyers. if the direction is to set them up at a given price the auctioneer is bound to do it. Corp. 395 & he must make it known. There are two views of selling at auction bidding up as we do & is practiced in Holland. And bidding down as is the <sup>pt.</sup> of Europe. An atty has a lien upon the papers & judg<sup>t</sup> belonging to his client for his fees & may direct payment to himself and if pay<sup>t</sup> is made to the client it must be made a gain to the atty. This rule does not hold as to commissioners as such. But this right of the atty is subject to the equitable claims of the adverse party who can make a set off. Doug. 100. 238. 2 Bl. Rep. 826. 4 T. Rep. 123. 6 ib. 361. 456. 8 ib. 70. 571. 1 East. 464. 1 Hen Bl. 22. 122. 217. 657. 2 ib. 440. 587.

#### Infants former courts

As the incapable to bind themselves may be agents or attys. Chitty Bills 28. Co. lit. 52. An atty in executing an instrument for his client must sign it officially, as to further rules on this subject see title of deeds & the following authorities. 9 Co 76. b. Sta. 705. 1<sup>st</sup> Ray 1418. 6 T. Rep. 177. 1 ib. 181. Chitty Bills. 24. 27. 56. 75 2 East 142.

An ag<sup>t</sup> cannot bind his principal by deed without an authority for that purpose given by deed. 7 T. Rep. 207. 209. 4 ib. 313. 2 Roll. 8. Com. Dig. atty C. 1. 5.

An agent for the public contracting as such for the public is not personally liable on his contracts the party must make his appeal to the justice of the government & it is not to be presumed that he will



be disappointed. 1 T. Rep. 142. 674. 1 East 582. 1 Root 89  
 These are the leading rules relating to the 5<sup>th</sup> class of  
 servants exclusively. We are now to examine in -

The rules relating to servants generally - and in  
 what cases is the master bound by the acts of his  
 servants & in what cases he may exonerate himself  
 of them -

It is a general principle that those acts which  
 are done by the express or implied command of the  
 master are the acts of the master and in genl.  
 all acts in the performance of the business in which  
 he is employed are deemed to have been done by the  
 command of the master. 1 Bl. 429. 442. 4 Inst. 109.

Qui facit per alium facit per se. Whatever the servant  
 does by the express command or <sup>of the master</sup> permission, in the  
 course of his business & whatever he does in the scope  
 of the general authority given him by the master  
 are deemed the acts of the master. Since a  
 contract made by a servant as a servant he having  
 authority to make it, is in legal contemplation  
 made by the master himself.

If a third person  
 makes an express promise to one as a servant the mas-  
 ter may take advantage of it being an act done  
 it. 3 Bac. 559. 2 St. Rep. 411. Godbolt 360.

If a servant  
 is cheated of his master's property the master may  
 recover it back by action against the wrong doer as

if he had been cheated himself. Cro J. 223. 1 Roll 98. 3 Bac. 559.

If a serv<sup>t</sup>. is robbed of the goods of his master in his master's absence, either the master or servant may have an ac<sup>n</sup>. ag<sup>t</sup> the thieves in that of him & cry. Salk 613 3 Mod 289. 2 Mod 303. 11 ib. 8. 12 ib. 54. — The reason usually assigned is that the serv<sup>t</sup>. is answerable over to his master. I do not take this to be the true reason altho it is laid down by respectable authority. For the serv<sup>t</sup>. is not prima facie liable to his master, the true reason is that the goods of the master while in the servant's hands are considered the goods of the serv<sup>t</sup>. in relation to every body but the master. the serv<sup>t</sup>. is chargeable as bailor. 1 Roll 105. Cro J. 265

In cases of this kind a recovery by either bars the other action & the commencement of the suit by one is pleadable in abate to an act<sup>n</sup> by the other. for the second shall not defeat the inc<sup>o</sup>nt<sup>o</sup> right required by the other. Latet 127

When a serv<sup>t</sup>. sues in such case he declares a possession as of his own goods. — this ratifies the reason I have above given. the very form of the action shows it correct. 3 Mod. 289. 2 Saind 379. Salk 613. 3 Bac. 69.

But if the property of the master is taken from the servant in the presence of the master, it is deemed to be taking from the possession of the master & he only can sue. 1 Hawk 148. Centt 145 Salk 613.

If the master's money is gained from the servant



when any illegal contract the master may receive it back. But if being entrusted with the money it, it can now be received back if there is no fraud on the other side and it would be greatest injustice if it could be for the master empowers the serv<sup>t</sup> to cheat the seller who justly considers possession the best title to money. the only remedy of the master is a g<sup>t</sup> the serv<sup>t</sup> 3 Bac. 559. — There are a variety of rules relating to Master's serv<sup>t</sup> for which I would refer you to the title Master's serv<sup>t</sup> 1 Bl. 430. 1 Roll 2. 8 to 32.

If the serv<sup>t</sup> does an unlawful act by command of the master both are liable. for the serv<sup>t</sup> is under no obligation to obey unlawful commands and the master is liable for procuring an unlawful act to be done. 1 W. 4328 1 Bl. 430. Esp. Dig. 580. 588. 3 Bac 563.

But it is said that if a serv<sup>t</sup> in obedience to his master's commands is instrumental in doing a wrong of which he himself is ignorant, he is not liable being a mere machine. this however is not of general application. Case. a master was guilty of false imprisonment in locking Plff up stairs. he gave the key to his servant with orders to give it up to no one but himself. the servant not knowing who was in the chamber was declared not to be liable. but this rule can apply only to acts in themselves harmless, and certainly cannot hold as a more general rule. for if the fact is in itself unlawful or con

stitutes a forcible injury the servant is liable for all the consequences. as to the first part when the act is unlawful it is an universal maxim that the actor is answerable for all the consequences. In the second when the injury is forcible altho the serv<sup>t</sup>. does not know that he is doing wrong he is liable. for in civil cases the law does not regard intention, and the actor is liable for every injury however involuntary or unintentional. 2 Bl. Rep. 892.

Suppose it directs his servant to cut a timber tree on B's land supposing it to be on his own land. the serv<sup>t</sup>. is doubtless liable. tho the serv<sup>t</sup>. can recover of his master all that he suffers provided he cuts unknowingly.

On the other hand those acts not done by the command of the master express or implied are not in law deemed to be the acts of the master so as he is not liable for them. neither can he avail himself of them. Suppose the serv<sup>t</sup>. commits any suppressible wrong not in the discharge of the business which he was gen<sup>l</sup>. or specially ordered to do as if being at work by direction in a field he leaves it to commit a battery or make a contract. the master is not liable.

3 Gall. 382. 1 Bl. 431. 8 T. Rep. 533. Skin. 228.

3 Bac. 562.

On this principle it was once decided that a servant employed in his master's business is liable for the wilful injury he commits if not done in pursuance of that business & the intention of the master.



master in his previous orders to affect the injury, for it not being in furtherance of the master's business, it was not done by his implied command. 1 East. 106. 1 B & P. 472. Salk 441. 3 T. Rep 762. 2 T. Rep 154. Contra 1 Wadd. 465.

I would now observe that when I first read this decision I thought it a deviation of principle, for if one was liable for the negligence he certainly would be for wilful injury, or misconduct of his servant and indeed the decision was novel to the whole proposition. An act was not for the wilful injury done by the servant declaring in Case the Court would not sustain the act saying that trespass was the proper remedy. An act of trespass was afterwards brought and the Court said no action would lie. In the former discussions all seem as if the Court & counsel took it for granted that some action would lie, the only question was whether it should be trespass or case. But now you said no action would lie. When the servant does it negligently the master doubtless is liable, but wilfully he only uses the carriage as the instrument of his passion or a whip, storm &c. and he only ought to be liable. -

I observed that if a servant while about his master's lawful business wilfully does an injury to another the master is not liable. - But if the injury accrues from the negligence or want of skill of the servant the master is liable, for he is bound to select all his servants skillful & careful servants, for he is liable for their negligence.

test or unskillfulness in this duty. but he is not an insurer against the effects of their unwise passion. In the one case the act is attributable to the master, but in the other it is solely the act of servant and he alone is answerable. Thus if the servant wilfully drive his master's carriage so as to damage some one the servant alone is answerable altho he uses the master's instruments.

But on the other hand if damage arises from the negligence or unskillfulness of his driving the master is liable altho he is not privy to the transaction.

6 D. Rep. 125. 5 ib. 548. 2 New Bl. 442. 1 East 106. 1 Bl.

431. Hence when a cart was carelessly driven against another cart & bilged a pipe of wine and in another case when a boy was injured the master was held to be liable. altho the servant was also. Salt 441.

Id. Kay. 739. 1 Wood 465.

So when the app. of a surgeon injures a person while dressing his wound either through carelessness or ignorance the master was liable. so too when the app. of a blacksmith lamed a horse in shoeing him. 2 Roll. 693. 1 Bl. 431. 3 Bac. 560.

As to the master's liability for injuries committed by the servant this distinction between those committed wilfully and those through negligence has been but lately established. It was taken for granted formerly by the court & counsel that the master was liable for both kinds of injuries. And the history of this distinction is a little remarkable. The great question was what was the proper action to recover of the master for the injury-



trespass or case. justice appears to have been done but the decisions were singular. In 1794 an act<sup>n</sup> was bro<sup>t</sup> on the case for wilful injury in the serv<sup>t</sup> who drove his master's carriage so as to do damage. It seems to have been agreed that the master was liable but the Ct<sup>l</sup> determined that Trespass was the proper action. 6 T. Rep. 125. About a year after an act<sup>n</sup> was bro<sup>t</sup> in Trespass for negligence in the serv<sup>t</sup> in driving the carriage the Court held case the proper action. 1 East. 106 1 B. & P. 472.

When an action is bro<sup>t</sup> for the injury occasioned by the negligence of the serv<sup>t</sup> in driving I confess myself of the opinion that case is the proper action as decided in 2 H. Bl. 442. notwithstanding the opinion in 6 T. Rep. for in this last case the court do not seem to have adverted at all to circumstances of the distinction between wilful & negligent injuries on the part of the servant. the form of action was determined indeed entirely independent of it. The case of Shiff & Deputy Shiff may afford me an analogy against me, as decided 2 B. & P. 832. 2 T. 352. But I should hold the action ought in both cases to be the same. Trespass was then said to be the action to be bro<sup>t</sup> ag<sup>t</sup> the Shiff for the acts of his bailiffs & Deputies. I take it however that he is liable in the

character of master civitibus. It is said that Shiff and his officers constitute but one person in law. this however is a mere legal fiction equally applicable to the case of master & servant.

But the ground of my opinion is this, that when the master is liable for any act of the servant it is on the ground of his own negligence in selecting a bad servant and putting him in a situation to do mischief. If this is the ground of the master's liability (as it surely is) an action on the case & that only will lie. the servant is liable in trespass. 1 B. & P. 432. n.

If a servant employs an independent in performance of his master's business, the master is liable for the neglect of this independent servant as is the servant himself, but the intermediate servant is not liable at all, for he is not personally engaged neither is master but has acted throughout as a servant & not as a master. 1 B. & P. 404. 6 T. Rep. 411

The rule that the master is not liable for the wilful torts of his servant is not universal, for there are cases in which the master is made liable in consequence of the wilful tort, altho he is not liable for a tort of this kind as a tort. The rule appears to be this that when the wilful wrong amounts to a violation of the contract express or implied between the party injured & the master, the master is liable. Thus if in shoeing a horse the apprentice of a blacksmith wilfully lacerates him, it is a breach of an implied engagement & the master is liable. for every one who



undertakes to do an act upon or about the property of another engages that it shall be done with skill & care. 3 Bl. 165. 6. 2 Ray. 910. 1 Hen. Bl. 158. Jones on Bailment. 73. 4.

But even in these cases the masters liability is founded on the breach of the engagement and not on the tort as such. He truly becomes liable in consequence of the tort. This is not then in truth an exception to the rule.

As to the liability of the Ship for the acts of his officers I would refer you to the title of Ships.

It has been two or three times decided that the Post master is not liable for the default of his subordinate officers, or Clerks, Deputies &c. He is himself a public and ministerial officer, & liable to the public but not to individuals for employing unskilful deputies. If they rob a mail he is not liable, for he is not a common carrier, he receives no money or stipend from individuals who lodge letters in his office. His pay is from the government and its being a certain percentage on the amount received does not affect the question. He is under no engagement to individuals. 2<sup>d</sup> Ray. 640. Carth. 487. Com. Rep. 100. Salk. 17. Cowp. 754. 764.

A post master is liable for his own actual default or neglect as the deputy and every member of society is. 3 Wils. 443. Cowp. 765. 2 Bl. Rep. 906.

And if he acts more than the law

allows. in debitoribus Ap<sup>t</sup> will doubtless lie for the re-  
tortion. Comp. 182.

We have been examining the rules  
as relating to torts committed by the Serv<sup>t</sup>. With  
regard to contracts. the rule is. that the master  
is liable for such contracts as are made for him by  
his servant whenever the latter acts within the  
scope of the authority delegated to him by his  
master. — The authority may be general or spe-  
cial, express or implied. 2 Vern 543. 6 Lj 3. Comb. 450  
Ld. Ray. 224. 3 Salk 234. 3 T. Rep. 757. 8 id. 331.  
1 Bl. 457.

A general authority to contract is not  
confined to any individual or specific contract  
but extends to all contracts generally or to all of  
a certain kind. Thus if a man usually employs  
a servant to purchase necessaries for his family the  
authority is general as to all contracts of this kind.  
A specific authority is confined to one or more indi-  
vidual specific transactions, as to purchase a horse. It  
is of such kind as is not usually delegated to the  
servants.

A gen<sup>t</sup> authority may be implied and often is  
from the usual & frequent practice of the master in  
employing the servant in business of that kind as  
to buy necessaries. 1 Bl. 430 — And a specific auth-  
ority may be implied tho such cases are rare, as if  
a servant should make a contract in the presence  
or hearing of his master, this would be a case  
of implied specific authority & the master bound by it.



Trust. / Pow. Con. 131. 2.

The consequence of a general authority is this. If the master has been accustomed to send the servant with money & in no other way the master is not liable for what he takes up on credit. But when he has usually and frequently permitted him to trade on credit, he is liable for the future contracts on credit which the servt. makes. in the first case he had given no implied authority to the servt. to purchase on credit & in the latter he has to the seller and to the public also. if he has ratified his contracts generally. 3 Salk 234. 1 Show. 95 1 Bl. 430.

And if the master has ever once paid a debt contracted by the servt. with <sup>out</sup> being authorized, said did not express any disapprobation. he will be liable for the debts the servt. afterwards contracts with that tradesman until he gives notice or expresses orders to him not to trust the servt. for by not disapproving he gives the tradesman confidence in the servt. & a right to trust him 1 Bl. 430. Chr. notes.

And if a servt. without a prior authority either general or special, purchases goods for the master and they come to his use. he is liable for them. for by taking and using the goods he ratifies the contract by a subsequent assent. which in most cases is as effectual as a prior one. 3 Salk. 234. Comb. 455. 3 Vent. 625. Chitty Bills 26.

Suppose however, in the last case the master had sent his servant with money & the servant had kept the money and purchased the goods on credit. afterwards the goods came into the possession & use of the master he supposing them paid for. The case has not been judicially decided but I think the master would not be liable. The tradesman must run his own risk. for in the case supposed there was no prior authority either express or implied. The master's letting & using cannot be said to amount to a ratification of the contract by way of subsequent assent. for this would be presuming a g<sup>t</sup> known fact. for he supposed the goods paid for & did not even know of the existence of the contract. 2<sup>d</sup> Ray. 224. 3 Talk. 284 3 T. Rep. 760. 5 Esp. 76. Peaker Rep. 48.

Altho the master has permitted the servant to trade on credit he may discharge his own liability for subsequent contracts by forbidding the tradesman with whom the serv<sup>t</sup> had got credit. to trust him any more on his acct. but a private order to the serv<sup>t</sup> has no effect upon the tradesman. it would be the greatest injustice if it had. nor has a private dissolution of the relation of master & serv<sup>t</sup>.

The rule in all these cases is that the prohibition or dissolution should be made as public as the credit before given to the serv<sup>t</sup>. 3 T. Rep. 760. 10 Mod. 109. Peaker R. 42. 154 12 Mod. 346. Chilly Billy 26.7.



If a serv<sup>t</sup> in selling property which he is authorized to sell makes a warranty, the master is bound by it, unless he expressly forbids the serv<sup>t</sup> to make a warranty thus giving an implied authority 4 T. Rep. 177. 3 ib. 757. Stra. 505. 653. Salt. 289. 10 Mod. 109. 1 Esp. Rep. 111.

But when the serv<sup>t</sup> acts within the scope of a gen<sup>l</sup> authority given our express prohibition not to warranty not made public & not known to the purchaser will not exonerate the master as a servant at a livery stable or a clerk in a store 2 Roll Rep. 5. Salt. 282. 289. Stra. 653. 3 Bac. 560. 3 T. Rep. 757. 4 ib. 177. Because from the gen<sup>l</sup> practice the public fairly presume a gen<sup>l</sup> authority & it would be a plain fraud if a private prohibition were allowed to protect the master 3 T. Rep. 760. 10 Mod. 109.

According to these principles I never have been able to reconcile a decision reported in Cro J. 469. Pop. 103. 2 Roll Rep. 5. 26.7. it is in the leading case of *Soutteran & How*. Right I don't know that case was ever said to be law. & servant sold a counterfeit diamond which both he & his master knew to be counterfeit and both knew also that it could <sup>not</sup> be sold for any considerable price unless its defects were concealed. The court held that the master was not liable in as much as he did not expressly direct the servant to conceal its defects. — Now this appears to me directly against principle. The ground I go upon is that the mas-

the would be liable unless he expressly forbids a warranty. And the wilful concealment of defects amounts to a warranty. 2 Roll. Rep. 5. Esp. Dig. 629. 632. 2 Swift 120. Bacon. Tit. Master &c (K)

There is also another strange rule laid down in the same case if I mistake not viz. That if the master sends a servant to sell an article to a particular person as A. & the servant sells it to him & conceals defects the master is liable. — But if the serv<sup>t</sup>. was sent without direction to sell to any one in particular & he sells it concealing the defects the master is not liable. — Now in these cases I never could find or feel, for I can sometimes feel when I cannot express a distinction. 1 Roll 95. Pop. 143. 4 Bac. 584 3 Bac. 560. H. Master &c. Tit. (K). —

The amount of the rule seems to be this, that if a man sets in motion an instrument of mischief intending to injure some one in particular as B. he is liable for the damage. but if without any intention to hurt any individual one tent to hurt all he could he would not be liable. —

The serv<sup>t</sup>. is regularly not liable on the contracts which he makes for his master, presupposing the authority to contract. He may however subject himself personally in such contract by engaging in his own name & on his own responsibility & if the master be not named he will not be liable 1 Roll 95. 2 Roll Rep 270. 3 Bac. 563



And undoubtedly if the serv<sup>t</sup> makes a contract for the master without authority, the serv<sup>t</sup> himself is personally liable. - for the master is not & if the servant were not it would be found upon the stranger. 1 Bow. Con. 128.

The rules relating to the power of servants to bind the master apply to all cases in which one person employs another to transact business for him at the latter is not ordinarily a servant, as in the case of a wife child or friend. the acts of these are the acts of the employer to all intents as far as their authority extends whether it be general or special. In order then to apply these rules it is not necessary that the agent should have been ordinarily employed as a serv<sup>t</sup>. it is sufficient if he were one *pro-mater*. 1 B2. L 30

In Gen. a rule has been introduced by stat. which is unknown to C. L. it is this if a child or servant is allowed by the master to contract or bargain for himself (the serv<sup>t</sup>) the master is bound and the serv<sup>t</sup> is not & the stat. says that such contracts made without the authority or consent of parent or master are void in law. St. Con. tit. Mas & Serv<sup>t</sup>.

you perceive then that contracts made by the servant or child for himself and in his own name are here deemed the contracts of the master if then the master permits the serv<sup>t</sup> to get credit where he can the master is liable and the stat. applies to all servants generally. There have been instances where the father permitted his infant son to take his freedom as

it is called and transact business for himself as in much-  
 audizing, the father is liable on the contracts of his son.  
 a law-Statute it that this stat as far as it relates to ~~servants~~  
 can extend no farther than to slaves and those ser-  
 vial servants and apprentices an under age. i.e. those who  
 are under the master domestic government & incapable  
 of contracting so as to bind themselves. for it is in-  
 conceivable that it should apply to day labourers or  
 servants of the 5 Claps. neither can it apply to app-  
 or domestics or minors of full age. for our minor  
 servants are universally in the habit of contracting  
 for themselves. I think that the statute should  
 be construed with this limitation.

A master is  
 not liable as such for the expenses incurred by the  
 sickness of his servant. the rule was formerly  
 that to be otherwise. This rule however cannot apply to  
 slaves their masters are undoubtedly liable. but as  
 to app. laborers by the day month or year or servial  
 servants the rule holds. It is usual for the master  
 to covenant for this in the indenture. if he does not  
 he is not holden. 2 Esp. Rep. 739. 3 B & 247. Con-  
 tra. Burr. set. ca. 497. 1 Esp. 270 —

We are now to enquire how far the servant is liable  
 for his acts and defaults to strangers & to his mas-  
 ter.

I observed that those acts which are not done by  
 the express or implied command of his master are not  
 deemed the acts of the master, in such cases



therefore the servant only is liable & not the master for the servant does not act as servant. 1 Bl. 431. Skin. 228. 2 B. & C. 582.

And this rule applies generally to all cases in which the acts of the servant are not in the discharge of any business or authority with which the master has entrusted him. as a servant should secure his master's business to commit a battery, theft or any wilful injury the servant would be liable & the master not. Esp. Dig. 603. Cowp. 406. Salk. 18. Cro. Eliz. 175.

There are other cases in which the party injured by the act of the servant may have his remedy against the master or servant at his election. and the rule is that if the servant through neglect, carelessness, ignorance or want of skill does an act in the performance of his master's business which is injurious to a stranger both servant & master are liable. provided that the business in which the servant was engaged for the master was not founded upon any contract express or implied between the master & the stranger. Thus if a servant through negligence or want of skill drives his master's carriage against the person or carriage of another, the master & servant are both liable. the party injured is under no obligation to look up the master he may consider the servant as he is in law and in fact the only actor and need not enquire into his domestic relations. Stra. 1083. 1 Wils. 328.

Thos. Ray 220. 6 T. Rep. 125. 411. Esp. Dig 580. 586.

But it is otherwise I conceive if the transaction in which the servant is engaged is founded upon a contract express or implied between the master & the stranger in such cases I take it that the master only is liable: the act of the servant is the act of the master in the furtherance of his business & in performance of his contract. the case exhibited by the party injured appears to be merely that of a breach of contract. As if when a taylor had undertaken to repair a garment & his app. in attempting should injure it the taylor only is liable. it is a breach of his contract. the bailment is violated. indeed in law none but a party to a contract can violate it. a third person cannot breach a contract tho he may subject himself by obstructing its performance. that however has nothing to do with this question. - the master only contracts. not the app. the party injured has nothing to do with the app. This case is not precisely decided in the books but you will find something applying to it in. Cowp. 406. 1 Bbl. 231. Galk. 603. Esp. Dig. 586.

There is an exception to this rule in the case of a shipmaster who is himself the servant of the owners. If the freight is an injured thro his neglect or ignorance he is liable altho the contract is strictly with the owners. It is said that he is to be considered as an officer rather than a servant but I do not see the force of this



explanation. The true reason I take to be that the contract is in point of fact personally and the rule is founded in public convenience & indeed necessity. The contract is usually made in a foreign country, where the owners cannot be reached and the only possible remedy is ag<sup>t</sup> the ship master. Salk 240. Carth 58. 1 Vent. 190. 238. Th<sup>o</sup> Ray 220. 16 T. Rep 125. where the case is laid down arguendo.

If a servant commits a wilful tort upon a stranger, I apprehend he would be liable altho he was engaged in his master's business and the act amounts to a breach of an implied contract between the master & stranger. for the act done was not the ignorance or negligence, nor was it in performance of the master's contract any more than any other wilful injury that had no relation to the immediate business. - as if the app<sup>l</sup> of a blacksmith should wilfully lame a horse by driving a nail into his hoof - it would be a trespass as distinct from the performance of the master's contract as the driving a nail into the horse's head. And I take it that if the master thus wilfully lamed the horse he might be sued for a breach of his contract or for trespass. 1 East 106. See Reeves Douc. Rep. 360.

I have observed that a public agent contracting as such is not personally liable. Upon this principle it has been determined that Indeb<sup>t</sup> ag<sup>t</sup> will not lie ag<sup>t</sup> a public agent for an over pay<sup>t</sup> made to him by mistake. Coups 59.

In such cases the only remedy is by application to government.

But this action will lie for money & costs as when a post master takes more than by law he is entitled to receive & applies it to his own use. this is not acting for the public; it is cheating for himself. Corp. 182.

It has been determined that when an atty being a witness to a release from A to B and afterwards brings an ac<sup>n</sup> for A ag<sup>t</sup> B notwithstanding the release the atty is not liable to B for bringing the action for he acts as servant. 1 Roll 95. 1 Mod. 209. 2 Bac. 595. 3 ib. 563.

This rule I once thought to be wrong, but I am now fully convinced that it is right in the case supposed. for it is to be observed that the atty is not bound to judge over his clients head. the clients might intend to plead fraud, or something the atty knew not of to the release - and if the atty knew of the facts he might be mistaken as to the law upon them.

But when an atty is guilty of a plain fraud in his own practice he is liable, as when the atty suffers a non suit & then when the adverse party was absent enters up judg<sup>t</sup> against him. Stat. ton. 125. Esp. Dig. 618.

The rules thus far relate to the liability of servants to strangers. the servant is also liable to his master for all wilful wrongs or neglect of duty by which the master is injured. as if a servant entrusted with the care of a horse suffer him to die. These rules



and laid down with reference to servants of full age with noticing ~~the~~ ~~privileges~~ the privilege of a minor servant for this would lead me into many minute distinctions which come more appropriately under parent & child 1 Wod 266. 3 Bac. 564.

Upon this principle it was determined that where a clerk had landed his master's goods before the duties were paid whereby the goods became forfeited by the revenue laws, the clerk was held liable to the master for the loss. Cro. 265. 10 Mod 109. 4 Bac. 589.

But no action will lie ag<sup>t</sup> a servant for bare breach of his master's orders unless some damage is sustained, as if a master were to direct his servant as to propriety of manner & he should disobey, should show any disrespect or use abusive language, no action will lie for it, the power of correction being considered a sufficient remedy 1 Sid 298. 3 Bac. 564.

But if a servant disobeys or neglects to perform an act commanded & the master in consequence sustains any damage an act. lies. And the fact that the master's business remains undone when it ought to have been done is always sufficient damage. 1 Sid 298. 1 Lev. 188. 2 Wils. 85. Moon 248.

The rule is the same when injury accrues from neglect of duty on the part of the servant, altho no express command was given as if an attorney should neglect his client's cause so

as to let it be non sented or dis continued. He is liable for all damages. for the client is not supposed to know the duty of his atty. of course no command could be expected from him. 2 Wils. 325: 4 Burr. 2060 Esp. Dig. 16. 17.

A serv. gnt. his undertakes only for diligence & fidelity not for strength or skill. that is the law does not imply any other undertaking. of course he is liable for such losses only as are occasioned by his want of diligence or fidelity 3 Bac. 564. 10 Mod. 109

This rule however does not apply to cases in which the serv. engages to do business, professionally in his master's service. for in such he does undertake to use all necessary skill. as an atty. to take care of a horse: for when one undertakes to do a thing in the line of his profession or business. the law presumes him to have sufficient skill & that he will use it.

Under the rule just mentioned the serv. is not gnt. liable for the loss of his master's goods by robbery. for ordinary care & fidelity will not prevent mischief occasioned by force. altho it may clandestine mischief. 4 Co. 84. 3 Bac. 564.

And it is a gnt. rule that a serv. is not liable for those losses occasioned by those accidents agt. which ordinary care & diligence is not a sufficient guard. What amounts to ordinary care he must be determined



by the circumstances of each case 10 Mod 109. 3 Bac  
564.

But whenever the master has been subjected to dam-  
ages for injuries occasioned to third persons by the neg-  
lect or misconduct of the serv<sup>t</sup>. the serv<sup>t</sup>. must in-  
demnify him in an act<sup>n</sup> on this case - 2 Str<sup>1</sup>  
1083. 10 Mod. 109.

This rule however supposes the mas-  
ter not to have been actually a party to the wrong  
committed by the serv<sup>t</sup>. for if he was he has no  
claim upon the serv<sup>t</sup>. as if he commanded the  
serv<sup>t</sup>. to commit the injury he cannot com-  
pel the serv<sup>t</sup>. to indemnify him for what he  
has loosed or any part of it. for between joint  
wrong doers the policy of the law will not  
enforce a contribution. 8 T. Rep. 186.

Of the master's authority over the serv<sup>t</sup>.

It is given as  
a gen<sup>l</sup> rule that a master may chastise his servant  
for any breach or neglect of duty as for disobedience  
negligence insolence &c 1 Bl. 428. 1 Sid. 175. 177.  
1 Vent 70. C<sup>2</sup> 6 h<sup>2</sup> 179. 1 Hawk 111. 130. 2 Vul. 622.

But  
this correction or chastisement must be reasonable or it  
will not be justified in the master. ib. anc. et 2 Mod.  
167. 8 ib. 120.

And the gen<sup>l</sup> rule first laid down does  
not apply to all the different classes of servants and  
those of the 5<sup>th</sup> class are in gen<sup>l</sup> not included. it

would be a new lesson to such servants as factors, brokers & c<sup>th</sup>, and state it that the right of chastisement extends to no servants except those who belong as such to the master's family, and that it is founded on the same principle as the right to correct a child. I regard it as one of the prerogatives of domestic government. Clarks in a slave the servants of the 5<sup>th</sup> Class are in a degree under the domestic government of the master.

The master has then a right to chastise for a reasonable cause, his slaves apprentices & in some cases, domestic serv<sup>ts</sup>. He may chastise a slave or apprentice of any age, but other servants of full age he may not, for it is said that if a master beats any other serv<sup>t</sup> of full age than an app. or slave, it is a good cause of departure, and of his discharge by the court of competent authority. & the same rule holds as to beating by the master's wife. 1 Bl. & 28 L<sup>it</sup> & Phil. voly. Fitz 168.

It is laid down in the books that the master cannot under this right of correction justify the wounding of his servants, that is he cannot justify under the authority of master. The rule is that he must correct moderately and if the serv<sup>t</sup> sues for ass<sup>t</sup>. battery & wounding, altho the master may justify the ass<sup>t</sup> & battery and say that he did it by virtue of his right to correct, yet this will not justify the wounding, the only available justification is such as would be good for any other person. 2 ellod. 167. 8 id. 120. 218. 330.

When a mas-



ture is sued by a serv<sup>t</sup> for a battery, the master must state in his justification, the retention or indenture or contract of service, the place where he was retained & employed & the business in which he was engaged, for these facts are all issuable. 1 Sid 177. 2 Bac. 566. 592.

This right of correction in the master is personal and cannot be delegated to another. He has no right to give a third person the power of judging when the serv<sup>t</sup> is culpable etc to punish him. for the contract between the master & serv<sup>t</sup> is fiduciary. 9 Co. 76a. 2d Ray 62. 310. 1 Sta 953. Cro. J<sup>o</sup> 360. 2 Mod. 167.

The inquiry would here arise how a school master came by the power to correct the serv<sup>t</sup> of another for if one is sent to school the schoolmaster has a right to punish him for a reasonable cause. The authority is in himself & is not delegated by the master. The sch<sup>r</sup> master has no right to punish the serv<sup>t</sup> for a breach of duty to his master, for a breach of duty to himself as sch<sup>r</sup> master however he has, the law gives it to him.

The question how far a master is liable for killing his servant in correcting him, comes more appropriately under the title of homicide. I would however just observe that it may amount to justifiable homicide manslaughter or murder according to the circumstances of the case. 1 Hale. P. C. 454. 473. 4 1 Hawk. 111. Foster C. 2 262. Ryfing 65. 5 Mod. 287.

As to the remedies that the master may have against

others for injuries done to the serv.

An action lies in the first place in favour of the master against any one who entices away his servant. the action must be laid with a praecipe. it is indispensable Cowp. 56 1 Mod. 469. 6 Mod. 182. Salk 380. 2 Ray 1116.

As to the form of the action I have remarked hitherto under the head apprentices that without doubt it should be case.

If a servant leaves his master without enticement, license or just cause. & is employed by another who knows of the former retainer. an action lies against the employer and the action must be laid with a sciens which is the gist of the action for the law would not subject one thus if he did not know. 2 Lw. 63. 10. 106. 4 Bac. 593. 4.

But an indictment does not lie at C. L. for enticing away another serv. it is only a private injury and not regarded as a public offence Salk 380. 3 Salk 191. 2 Ray. 1116. 4 Bac. 593

By a late stat of this state however. the enticing away the app. of another whether bound by indenture or not is made penal. the penalty not to exceed \$100. the st. further provides that the penalty shall not absolve the master if his remedy or satisfaction & that he may recover his damages in addition to the penalty. H. Con. lib. 2. pp. 118.

If a serv. is beaten by another he may have an action



like any other person, and if loss of service accrues to the master from the injury, the master may have his action for the loss of service. And a recovery by one is no bar to an action by the other. the injuries of the servant & rights of the master are altogether distinct. that of the servant is corporal, that of the master pecuniary being loss of service. 7 Co. 113. 10 Co. 131. 2 Buls. 198. 1 Sid. 175

In this case as in that of embezzlement the master must allege with a bill of goods his right of action being founded on the consequential loss of service. the battery of itself is to him no cause of action. Cro. 8. 618. 1 Bl. 429. 9 Co. 113. 2 Roll. 682.

A man's minor children are all his servants within these rules, that is those who are residing with him & are in his service. so is an adult child if he resides with the father as a subordinate member of the family. Hence arises the practice of bringing an action with a bill of goods & services against in case of seduction. this is however merely nominal.

If a servant is beaten so that he dies the master has no remedy at C. L. the civil injury being merged in the public offence for it is a general rule of C. L. that no one can recover for a civil injury involved in a felony or a capital crime. Yelv. 89. 90. 2 Roll 568. Ray. 339. 1 Bl. 594.

It has been determined that if a surgeon who is employed to cure a wound intru-

tionally injure the serv<sup>t</sup> so that a loss of service ac-  
crued thereby to the master, an action lies for the  
master, but I do not find it determined that it  
would lie unless the injury were intentional, but  
I see no reason why it would not if the injury and  
consequent loss of service were occasioned by neglect.  
The servant could doubtless recover for the tort in  
both cases. 1 Roll. 98. 2 Bul. 332. 3 Bl. 568. 2d Ray 214  
2 Wils 359. 3d. Dig. 631.

When a serv<sup>t</sup> who was intrusted away  
or dep<sup>o</sup>rted without sufficient cause is sued by the  
master and a full satisfaction recovered, this recovery  
is a bar to an act<sup>n</sup> ag<sup>t</sup> the party who intrusted, other  
wise the master would recover a twice fold satisfaction  
3 Bur. 1345. 1 Bl. Rep. 387.

What acts the master & Serv<sup>t</sup> may justify in each  
other's defence.

A master may maintain or set off his  
serv<sup>t</sup> in an act<sup>n</sup> against another without incur-  
ring the guilt of maintenance. which is set-  
ting a stranger in a lawsuit. 1 Bl. 429. 2 Roll  
115.

And the books are agree that a servant may  
justify an apprentice in defence of his master, but  
is such acts as he could justify in his own defence  
were he personally attacked. it is said to be the du-  
ty of the serv<sup>t</sup>. 3 Bac. 568. 1 Bl. 429. 2 Roll. 526.  
Talk 407.

But a serv<sup>t</sup> cannot justify an apprentice



in defence of his master's son or any other part of the family, for he is not serv<sup>t</sup> to them the right grows out of his relation as serv<sup>t</sup> to his master. 4 Bac. 594 By this is meant that he cannot justify as servant or as he could in defence of himself. for any stranger may justify violence in defence of another in certain circumstances.

It is said that a serv<sup>t</sup> cannot justify violence in defence of his master's goods it appears to me very strange if when the goods of the master are about to be taken from his house the serv<sup>t</sup> may not protect them and with violence if necessary. If the goods were in the possession of the serv<sup>t</sup> he certainly could justify it. The rule as it is laid down appears to me to be too general. 4 Bac. 594

On the other hand whether a master can justify an assault in defence of his serv<sup>t</sup> has been an unsettled question. By some it is said that he cannot. because if any right of his is endangered by the beating he has his remedy over by action. Now it appears to me that a master can justify an assault in defence of his serv<sup>t</sup>. it seems very unreasonable that a master should be bound to stand by and see his serv<sup>t</sup> beaten because he has his remedy by action. so far as this reasoning goes no one would have a right to commit an assault in defence of himself unless his life was endangered. Besides the author of the injury may be wholly irresponsible and in some cases this is a prevalent reason. Upon

the whole, I take the better opinion to be that a master may justify an assault in defence of his servant. *Louis. Pl. 124. 5. 6. 4 Bac. 594 2d Ray. 62, Salk 257. 1 Bl. 429.*

It is a rule of law that an individual may avoid a deed obtained by duress: but a servant cannot avoid a deed obtained from him by duress of his master, as if the master were falsely imprisoned and would not be released until his servant executed a deed. *1 Roll 687. 4 Bac. 594*

The relation between master & servant is not so intimate as to void such deed. but as it was obtained by violation of good conscience I think a court of equity would relieve against it. but it would not be void in law.











## Baron and Feme.

Marriage is regarded by the C. L. and also by our own law as a contract purely civil, and it is regulated by the municipal law of every country at least of every protestant country.

There is however one incident derived from the divine law which is adopted by the Mun. Law viz that husband and wife for many purposes are regarded in law as one person. 1 Bl. 442. 433.

By marriage the parties respectively acquire certain rights in the property of each other. The general principle in regard to the husband's right to the property of the wife, is formed upon the husband's duty to maintain and protect the wife. Hence his estate is so far his as to enable him to discharge these duties.

The right which he acquires by marriage is different in relation to different species of property, and the first species is personal chattels in possession, as to those the genl. rule is that it vests in the husband absolutely by the marriage. Hence he may dispose of them at pleasure & even bequeath them. There is an exception to this in case of a certain kind of paraphernalia, which I shall say by & by notice. But the genl. rule is that he may dispose of them by act & title or by will. 2 Bl. 435. 1 Bac. 289. 1 Inst. 351.

By person



all chattels in possession is meant personal property as  
 contra distinguished from personal property in action  
 or choses in action. Thus horses, money, furniture &c are  
 personal chattels in possession and thus become the hus-  
 bands absolutely. - But choses in action as notes,  
 bonds, bills of Exchange or any evidences of rights  
 to things and not the thing itself, are a species  
 of property of a different cast. - If the husband dies  
 intestate those chattels in possession are transmitt-  
 ed to his representatives and the wife cannot resume  
 them. *ib. auc.*

But the husband has no beneficial  
 interest in the property which she holds in the right  
 of another at the time of her marriage, as if she  
 were Esq. or Adm<sup>r</sup>. indeed the beneficial is not in  
 the wife she brings a mere trustee. *ib. auc.*

<sup>The</sup> husband is also entitled to all the personal prop-  
 erty or chattels acquired by the wife during  
 coverture. Thus if a legacy be given to the wife dur-  
 ing coverture it belongs to the husband. So if a gift  
 is made to her of a horse or carriage. So if she earns  
 anything by her labour. These are as much the prop-  
 erty of the husband as if she owned them before coverture  
*Salk. 114, 115. 1 Bac. 476. 292. Esp. Dig. 127.*

<sup>as to the wife</sup> personal property in action or choses in action, the rule  
 is that the husband may dispose of them at pleasure  
 during their joint lives, but he must reduce them

into possession or do some act of ownership, like equivalent to that in order to give himself the absolute ownership or disposition of them. - otherwise if he dies they will survive to her. Thus if a wife owned a bond at the time of her marriage. 1 Inst. 357. 1 Stra. 516. 3 Wils. 55. Ch. Bills

and by C.L. if the husband had not reduced the choses of his wife into possession before her death. that is during coverture, or their joint lives, all property in them would go to her representatives. In Eng. however the stat 29 Ch. 2. has altered the law in this respect. 1 Bl. 515. 2 Bac. 428. 1 ib. 289. 1 Chit. Pl. 21. 2 Bl. 435 Com. Dig. Bar. & F. 8. 3.

But altho. the husband in such case by C.L. loses all title to the property as husband, yet by Stat. 31 Ed. 3. & 29 Ch. 2. the husband in such case will take as adm<sup>r</sup>. to the wife. for by the first mentioned stat. adm<sup>r</sup>. is excluded to be given to the next friend, who is the husband. & by the other he is relieved from the necessity of accounting with her representatives or distributing her effects. 2 Bl. 435. 1 Chit. Pl. 21. 1 Roll 910. 1 Bac. 289.

Under our law the husband as adm<sup>r</sup>. has no such right. for in Con. adm<sup>r</sup>. goes in all cases to the next of kin and there is no special provision made in case of intestacy of the wife. neither is there any at common law. and as our stat. compels distribution without any exception in favour of the husband, he is ad



much bound to distribute as any other administra-  
tor. Stat. Com. 165.

But the husband cannot even  
upon Eng. principle and still left by our laws be-  
neath his wife's claws in act<sup>n</sup> for the rule is that  
he must reduce them into possession during cov-  
erture, & the bequest does not take effect until after  
his death & the coverture determined. 1 Inst. 357  
1 Bac. 28.

But although the husband is not bound by  
the Eng. stat to distribute, yet he must pay the debts  
of wife contracted before marriage out of such chose,  
and if he can hold them from his wife's representa-  
tives, he cannot from her creditors. You will re-  
member that the husband is only liable for the  
debts of the wife contracted before marriage, during  
coverture, after that determined he is not liable for  
such debts as husband, tho if he has assets he  
may be as ad<sup>r</sup>. 1 Inst. 357.

And it has been deter-  
mined in Eng. that if the husband refuses to act  
as ad<sup>r</sup> and another is appointed, the husband is  
entitled to the residue after debts paid as next of kin.  
This appears to me to be carrying the rule very far  
and indeed to an unwarrantable length. It is  
plain that this law was made by men & not by wo-  
men. You will remember that all ad<sup>r</sup> next of kin  
are bound to distribute to the next of kin. 3dlt  
526 1 Wils. 168. 1 P. W. 381.

And it has also been stated

mind, that this right of the husband is transmissible to his next of kin, on his demise and not to those of the wife or her representatives. it seems, now both these rules appear to me directly repugnant to the rule before mentioned that the choses go to the wife's representatives, and there are a vast number of authorities to support that rule. They appear to me to be founded upon a forced construction of the words "next of kin." 1 Bac. 482.

But altho. the husband does not by the marriage ipso facto acquire a title to the choses in action of the wife, yet it is said if he has made a settlement upon her, they become absolutely his & if he dies first they go to his representatives, indeed the settlement is considered as a purchase Per. Cha. 63. 312. 412. 2 Vern. 531.

However according to other authorities this rule does not hold unless there is an express or implied agreement to that effect, and supposed to be in consideration of the choses, or words which show that to have been the understanding. The old rule was unqualified, but states the law now to be, that a settlement is not necessarily a purchase, and will not amount to one unless something is said from which it can be inferred that that was the understanding. Amb. 692. 3 P. W. 199. note. Per Cha. 209. 1 Vern. 20. 2 Vern. 64.

If the settlement be made after marriage it is never considered as a purchase of her choses, cestui que.



note of all of them, unless the settlement is, in the opinion of the Chancellor an adequate one. This leaves a great deal to the discretion of the court. 2<sup>nd</sup> ed. 448. Rob. Fr. Con. <sup>285</sup> note.

Amount of rent due to the wife when she becomes absolutely the husband by marriage, this then is an exception to the genl. rule, it is not however C. L. it is a more positive regulation derived from the construction of the stat. of 32 Hen. 8. and plainly varying from the C. L. 1 Chit. Pl. 21. 2 Bac. 17. 3 Bl. 434. 5. 1 Com. Dig. 556. Co. Litt. 351. b. Rev. 31.

If a debt of the ~~husband~~ & wife is sued & judg<sup>t</sup> obtained, the husband &c. are joint tenants of that judg<sup>t</sup> - it belongs exclusively to neither, the judg<sup>t</sup> has ascertained the state of the rights, before judg<sup>t</sup> it stands as all such choses do, but the judg<sup>t</sup> is in the name of both 1 Bac. 293. 1 Vern 396. Sid. 337. 1 Mod. 179 3 ib. 189. 1 Com. Dig. 555. 1 Sw. Dig. 27

And if either dies before the judg<sup>t</sup> is collected or satisfied the whole in Eng. survives to the survivor, by virtue of the *jus accrescendi*. 3 Mod. 189. note 1 Chit. Pl. 21. - Now in Con. the *jus accrescendi* is wholly unknown, and on the death of one joint tenant the right is transmitted to his representatives. So in this case I should suppose that one half of the amount of the judg<sup>t</sup> would go to the representatives of the deceased, the other half to the survivor. Judge Reece used to say & I don't know but he still does, that the whole would go to the wife

In Eng. it would go to the survivor by the jus accensendi. But in Con. the same rule applies to joint-tenants as to tenants in common generally, and I see no reason for making an exception in this case.

But in Con. as well as in Eng. if the wife dies the entire right of collection survives to the husband, when the property remains unsatisfied. The rule is the same as to strangers. But having collected, he is to account with the wife's representatives for all if Judge Rive is right for half if I am.

since the

husband may sue out Ex<sup>ce</sup> by scire facias, or bring a writ on judgment and he may have Ex<sup>ce</sup> without a scire facias, for he having the entire right ought to have all the necessary means. 1 Bac. 293. Cro. Ch. 208. 1 Chit. Pl. 21. Faltk 116. Gl. Ray, 1050. Parth. 415. 1 Com. Dig. 555. 1 Mod. 177. 3 Mod. 189. 1 Geo. 337.

The husband may during the coverture sell or assign his wife's choses in action for a valuable consideration, but a gratuitous assignment of them is not good against the wife. The reason is that the assignee for choses conveyed only an equitable interest, the assignee not having the legal title, cannot recover in a court of law and Ch<sup>y</sup> will not enforce an inequitable unconscionable claim against the wife. 3 P. Rep. 94. 20th 208. 420. 1 Fent. 309. 3 P. W. 199. 1 Bro. Cha. 114. Rob. Fu. Con. 295.

It has indeed been determined



that such voluntary assign<sup>t</sup> the void as to assignee  
was such an act of ownership as changed the property  
so as to vest it in the husband. But it has since  
been determined that it is not law for if it were  
the other rule would avail nothing. 1 P. W. 380. &  
contra 2 Attk. 208. 1 Bro. Cha. L. 304 Rob. Fr. Con. 295.

The husband however may discharge that is release  
his wife's choses without consideration. 2 Attk. 208. 1 Fort.  
308. — This may appear an arbitrary distinction from  
the rule above, but it is not so. for a release is a legal  
instrument whereas an assign<sup>t</sup> is not so. and the hus-  
band having the legal title to the choses of his  
wife can release them. and the release may be  
pleaded at law and Ch<sup>y</sup>. cannot set it aside as  
they can a voluntary assignment.

When the husband  
is obliged to resort to Eq<sup>y</sup>. to recover the wife's choses  
as when they are in the hands of a trustee, the court  
in genl. will not interpose unless he will make a  
reasonable provision for the wife for the court will  
not enforce an equitable right in his favour an-  
gainst a stronger equitable right against him.  
1 P. W. 382. 258. 3 Vy. Inv. 15. 506. 4 Bro. Cha. 266.  
3 P. W. 212.

And if the husband assign for a valuable considera-  
tion, the assignee is under the same obligations,  
and is liable in Ch<sup>y</sup>. to make provision in the same  
manner as the husband is & the court will not  
interpose without. for it is supposed that he knew

what equity required, when he bought them he must have known that they belonged to the wife so that there is no fraud and he has no higher right than the husband had. 1 P. W. 251. 382. 458. 1 Bro. Cha. 326. 3 Vy. Inst. 15. 506. Rees' 11. 1 Bac. 481.

Again the creditors in action of the wife are not liable to be taken for the husband's debts when his death if she survives, unless indeed they were purchased by settlement as before stated. 1 Inst. 351. 1 Bac. 289.

If they could the rule that subjects them would contradict a former rule, that the choses are to remain hers, unless he reduced them into possession. Nor can they be taken in Eq<sup>y</sup> by his creditors during their joint lives, for they have not become his, and besides, no chose in action can be taken in Eq<sup>y</sup> —

If at the time of the marriage, the goods of the wife are in the possession of a third person by bailment or finding, the right of the husband to them is as absolute as if they were in the wife's actual possession at the time of the marriage, and he must sue alone for them — for they are specific chattels and although in the manual possession of bailor or finder, yet not being converted they are considered as in the wife's possession.

1 Y. Id. 172. 1 Vent. 261. 1 Keb. 641. 1 Bac. 289. 4 T. R. 483. 596. 1 Bro. 137.

But otherwise if his goods had been taken and converted before marriage, or an injury or a trespass had been committed for which a claim was to be made, in



such case the husband cannot sue alone, for the right of the wife is converted into a chose in action & the wife must be joined, 3 T. Rep. 631.

It has been much questioned whether if the goods were bailed or found before and not converted until after marriage, the husband in an action of trover must, may, or can ~~join~~ join the wife. I conceive that it can never be left to his option, the rule must be positive that he must or must not. you will see the different opinions 1 Sid. 172. 3 T. Rep. 631. 1 Vent. 261 1 Glv. 107.

A contract by which one is bound to pay money to the wife is subject to the control of the husband and not to that of the wife. The legal right is in him, & he only can discharge it. the wife is no party, but she can receive the money and a pay<sup>t</sup> to her would be good. but she cannot discharge the contract. The reason is that the party by the contract is to be bound to her, but being no party & not having the legal title she cannot discharge it. 3 East. 331.

Of Husband's title to his wife's chattels real

These

are such personal property as savour of the realty, i.e. personal property annexed to or arising out of real estate, as terms for years or mortgages. <sup>they</sup> are not real because not freeholds, for whatever is not freehold is a chattel, and is called chattel real as com-

is distinguished from chattel personal. 2 Bl. 386.  
 Over this species of property when vested in the wife  
 the husband has a more extensive power, than over her  
 choses in action. Thus a term for years belonging to the  
 wife is subject to the husband's debts during cover-  
 ture, & may be taken in E<sup>x</sup> but her choses in ac-  
 tion are not thus liable. 1 Inst. 46. 357. 1 Roll. 344  
 4 T. Rep 638. q. 2 Bl. 386.

<sup>the</sup> foundation of this  
 distinction between  
 chattels real & choses  
 or both powers of the  
 husband is his ten-  
 to a house the former  
 and choses in action  
 will.

Again the husband has a right to dis-  
 pose of them absolutely during coverture, and even  
 without a valuable consideration, because his convey-  
 ance confers the legal title. But if he does not  
 dispose of them during coverture and she survives  
 him, they go to her. So that during their joint lives  
 they are considered quasi-<sup>tenants</sup> of the chattels real.  
 Pra. Cha. 418. 2 Bl. 434. 1 Inst. 357. Sta. 516.

And on  
 the other hand, if they are not disposed of during  
 coverture and she dies first, they survive to the hus-  
 band. That is they survive to the survivor. It has  
 been determined in Con. that if the wife dies first  
 her chattels real go to her representatives, but it is  
 an departure from the C. L. 2 Day 338.

By C. L. Min  
 the husband or wife can devise such chattels real  
 for the right of the survivor is prior and preva-  
 lent to that of a devise, and besides by C. L.  
 a wife could make no devise at all. Pra. Cha. 418.  
 2 Vern 270. 2 Bl. 434. 1 Inst. 351. a.

The husband may



by and recited during coverture. dispose of his wife's chattels real, to vest in possession after coverture, for the right of future enjoyment vests during their joint lives and the conveyance comes within <sup>the</sup> description of dispositions during coverture and tho he cannot dispose of them by will, yet he may by grant to take effect in possession after his own death. Cro. Eliz. 287. 1 Roll. 334. 4 Bac. 16. Co. E. 287. Co. 155

But

the chattels real of the wife are not liable for the debts of the husband after his death if she survives him, for her right intervenes and is prior to any right of the creditor, and as he could not by will subject them to his debts, no act of the creditor shall. 1 Roll 324. Lit. sec. 286. 1 Inst. 184. b. 3 Bac. 209. 10.

Now by C. Larc. has

chattels real liable for her debts when she dies first for the husband's right by survivorship intervenes before that of the creditor, (as before, at sup) it is true. But according to the doctrine holden in Court, the rule must be different, the chattels must survive to the wife's representatives and be subject to her debts.

If a feme sole joint tenant of a chattel real, marries and dies, the whole interest goes to the other joint tenant & none of it to the husband, for he has an anterior inheritance right, which will of course exclude the husband. Plow. 412. Co. Lit. 185. 1 Bac. 287.

But the husband

in this case has the same power to sever the joint ten.

away by an actual disposition of the wife's moiety as she had when sole. and in this manner he can prevent the survivorship. it auct.

The husband during coverture may assign even in Eq<sup>y</sup> the wife's chattels real and without consideration. because the legal title of them is in the husband. not so of her choses in a<sup>c</sup><sup>n</sup> & therefore he cannot assign them in that manner. 1 Vern 7. 18. 2 ib. 270. 3 P Wm. 39. Rob. Fu. Con. 299 to 301. For you will observe that Chf. follows and does not contravert the law.

### Husband's right to the wife's real estate.

Of this the husband has the sole usufruct or the right to use and occupy, but he cannot by his sole act alienate the wife's inheritance. this power is not given him by the law. it not being considered necessary to enable him to support & protect the wife. 10 Co. 42. 1 Sid. 11. 1 Bac. 286. 300.

Nor can they by their joint act alien this except by matter of record as by fine or recovery. for no other act is considered sufficiently solemn to enable the wife to alien her inheritance. The reason is that it stops her to plead her coverture in avoidance. 1 Bl. 444. Lit. 669. 670. 1 Bac. 301.

In Con. however the joint deed of both will convey the inheritance of the wife. by construction of the stat. and that is now the established mode of conveyance. Stat Con. 444.



If the husband during coverture grants a larger estate out of his wife's inheritance than for his own life. there is no forfeiture as in other cases of tenant for life. for the coverture prevents the wife from taking advantage of the forfeiture. and the law knows nothing of rights which it does not enforce. Lit. 415. 594. 1 Inst. 326 q Co. 140 2 Bl. 274

Such conveyance however will only serve as a grant for the husband's life at most and possibly for life. for if he is not entitled to the curtesy and the wife dies first the grantee will not hold even during the husband's life. for it determines on the death of the wife. 1 Bac. 301 1 Inst. 326.

If the wife survives the husband. her real estate reverts solely in herself. & on her death the fee vests in her heirs. Tho if he survives his wife and has had a child by her born alive and capable of having inherited. he has an estate for life as tenant by the curtesy of all the real estate of which the wife died seised. Lit. s.c. 35. 52. Co. Lit. 30. 2 Bl. 126. 1 Bac. 557.

And if from sole mortgages in fee married and dies her husband has the same title to an estate by the curtesy in the equity of redemption. provided he could have had a curtesy if the wife had had the fee. And yet the wife in parallel cases is not entitled to dower. as I shall notice here after. 1 Attk. 673. Pow. mortgages. 112. to 115.

In those places where the Gavelkind custom prevails the husband is entitled to the curtesy without having had children by the wife. By our charter the lands in Con<sup>t</sup> are holden in gavelkind and yet curtesy is now allowed here without the C<sup>t</sup> requisite. 1 Inst. 30. 2 Bl. 128. Stat. Con. 8. 432. 1465.

But there can be no estate by the curtesy in a remainder or reversion for the wife does not die seized for to entitle the husband to the curtesy the seisin of the wife must have been actual and this cannot be of a remainder or reversion. 2 Bl. 127. 1 Inst. 129.

A husband may have an estate by the curtesy in an incorporeal hereditament belonging to the wife altho the wife did not die seized for actual seisin is impossible in the nature of things (might it not be said that she has all possible seisin) But where the subject is capable of or the thing is such as that there can be actual seisin, the husband is not entitled to the curtesy unless there was an actual seisin 2 Bl. 130. 1 Inst. 29.

But in Con. it has been determined that actual seisin was not necessary to entitle the husband to the curtesy and that it is sufficient if the wife at the time of her death had the legal title & the right of seisin. 4 Day 298

To entitle the husband to the curtesy the marriage must have been lawful, a marriage de facto is



is not sufficient for this purpose. and the child must have been born alive during the life of the mother. 8 Co. 35. Plow. 263. 2 Bl. 127. 1 Inst. 29. 30.

But by the birth of a living child the husband is tenant by the curtesy initiate. his right is inchoate and is consummate only on the death of the wife. during coverture he is entitled to the usufruct as husband & after coverture determined his title is by the curtesy 2 Bl. 128. 1 Inst. 30. Bac. 659. 666.

Rent accruing out of the wife's real property during coverture goes by C. L. to the survivor. This is in the nature of a chattel Int. & goes as they grant do. 1 Inst. 351. a. 4 Co. 51. 1 Roll. 350 Chub. 692. 2 Bac. 17. Rev. 21.

By C. L. the wife can hold no separate property or property to her own sole and separate use. that is property over which the husband has no control. This arises from the strict principle of the C. L. by which husband & wife are identified.

But now a gift to the sole & separate use of the wife is protected in Ch. against the claims of the husband and he can have no rights to it either by the curtesy or otherwise. 1 Don 94. 5 1 Atk. 270. 1 Pow. Con. 103. 444. 2 Vez. 191. 665. 2 P. Wm. 79. 316. 1 ib. 126.

In Ch. then the principal effect of uniting property to the sole & separate use of the wife is to exclude all control of the hus-

band over it by virtue of the marital rights. But the wife may exercise as absolute an authority over it as if she were a free sole, except that she cannot devise being debarred of this right by stat 34 & 5 Ann 7. 8. This rule however is completely eradicated by means of uses & trusts, yet a free covert cannot devise so nominally. 2 T. Rep. 695. 1 Pow. 444 1 Fon. 87. 91. 98. 102. 3. 1 Attk 270. 3 ib. 393. 695. 2 V. 191. 663. Pow. 2: 150. 165. 6.

The husband by virtue of his power over the real property of his wife has no authority to defeat by his dissent, a gift to the sole & separate use of the wife. his right is exclusive of his & he can no more control the execution than he can the use. If however it is a purchase or gift to the sole & separate use, he can dissent & defeat it. 1 Inst. 3. a. 356. 1 Bac. 303.

Nor can the husband defeat or prevent an estate from descending to the wife by inheritance, as when an estate descends to her as heir, the law casts it upon her and the husband cannot prevent its vesting. 1 Inst. 3. a. 356. 1 Bac 303. 2 Bl. 292. 3. Com. Dig. Bar. & Fenu. P. 2.

But the wife herself may dissent from or satisfy any purchase made by her during coverture, and tho the husband absolutely assents still she may refuse. 1 Roll 347. Doug. 435. Com. Dig. Bar & Fenu. 2. 1 Inst. ibid. & some other Reps.

It was once supposed that the wife could not judge property in her own name to her



sole & separate use and that it was intended that  
 trust should be appointed to hold in trust for  
 her. But it is now well settled that the property  
 may be limited immediately to her by name to her  
 sole & separate use. 1 Pow. 94. 98. 1 P.W. 126. 1 Ch. 270  
 3 P.W. 334. 1 Vin. 245

And such property may now be  
 given directly to the wife by the husband as well  
 as by a stranger, and she will hold it during  
 coverture, whether given before or after marriage,  
 and if a husband makes a gift to his wife for  
 her sole & separate use, he is considered as trustee &  
 the wife may in Ch. enforce the trust against  
 him. 1 P.W. 126. 3 Ch. 399. 2 P.W. 79. 316. 1 Pow. Com. 444  
 2 Vag. 665. 3 T. Rep. 618. 5 T. Rep. 434.

It has been deter-  
 mined if a person sole proprietor of a trust term for  
 years for her sole & separate use, marries that the  
 interest vests in the husband. But there has been  
 a later decision that overrules this and I think  
 correctly for I see not how it can hold if the  
 principle is allowed which is strongly established  
 viz. that a wife can hold property to her sole  
 & separate use. 1 Vin. 7. 18. 2 Ch. 270. 2 Ch. 421. 3 Bro.  
 Cha. 345. 1 Inst. 3a. note 1. 112.

Voluntary conveyances  
 by a woman before marriage have been some-  
 times regarded fraudulent & void as to the hus-  
 band in Equity. As when a woman on the eve of  
 marriage unbeknown to her husband con-

ruled away. his estate in that manner <sup>to a stranger</sup> it was held void. 1 Fon. 259. 2 Vin 17. 2 P.W. 535. 2 Vig. 264. 2 Bro. Cha. 345.

But if a widow without the knowledge of her intended husband. make a conveyance by way of provision for her children by a former marriage. the husband cannot set it aside. and it is strictly just for these children ought to be preferred to the other husband. 1 Fon. 259. 1 Vin 208. 2 P.W. 358. 1 Attk 265. Cowp. 705. Rob. on Fr. Con. 351. to 359.

Of the wife's right to the property of husband. By stat. 22 Ch. 2 and a similar one of our own it is enacted. that if the husband dies intestate leaving issue the widow is to have one third of his personal property absolutely as her own. and if he leave no children then the widow is to have one half. but in both cases the debts are to be paid first. 2 Bl. 515. 2 Bac. 427. 8.

And as to the real estate the widow is by C.L. entitled to a life estate in one third of all the inheritable property of which the husband was seized at any time during the coverture. and which any issue she might have had could have inherited. Stat. sec. 36. 2 Bl. 129. 131

By C.L. the husband could not by any alienation of his own bar the wife of this right. the wife may bar her own right by an act of her own. but it must be a judicial one or mat.



tu of record. By C. H. her own deed will not bind  
her nor will the joint deed of husband & wife,  
2 Bac. 139. 140. 10 Co. 49. Plow. 515.

In the state of New

York & Mass. the wife may bar her right of  
dower by joining the husband in a deed. this how-  
ever is given by stat. — If then she has not thus barred  
herself she is entitled to dower if any issue that she  
might have had could have inherited the estate.  
but if no issue could have inherited she is not  
entitled to dower in that estate, as where an estate was  
limited in special tail. 2 Bl. 131. Lit. 53.

But the person

claiming dower must have been the actual wife  
of the other party at the time of his death. Hence  
at C. H. if there had been a divorce a vinculo mat-  
rimonii, there could be no dower, for the woman  
must be wife at the time of death. 7 Co. 7. 5 Co. 98.  
1 Rob. 681.

But a partial divorce called a mensura et  
tunc does not deprive the wife of dower for it does  
not destroy the relation, it is a mere husband & wife  
separation and does not dissolve the contract 1 Inst 32.3  
9 Co. 19. Noy. Max. 108. 2 Bac. 180. Co. Ch. 41.

And if the husband  
at the time of marriage was under the age of con-  
sent and died before attaining that age, the  
wife is still entitled to dower, for the marriage  
is only voidable and not having been voided it re-  
mains good. 1 Inst 33a. 40a.

But no female can be widowed unless above the age of 9 years. tho she may be betrothed earlier. It is not material how old she is. the law not noticing impotency arising from age. 3 Bl. 131. Lit. 36. 1 Roll 675. Co. Lit. 33. 40.

It was formerly determined that the wife of an idiot could be widowed. but it is now settled that she cannot. and it was always settled that the husband of an idiot was not entitled to the curtesy. It is plain that in these cases there can be no valid marriage. 2 Bl. 130. 1 Inst. 31. 1 Lev. 41. Paley at p. 136. Esh. Dig. 125

A widow's right of dower is paramount to the claims of a devisee. creditor or mortgagee provided the mortgage was made after marriage. The reason is that her right to dower is prior in its commencement to such claims. Her title as dower commenced at the marriage or at the first seisin or acquisition of the husband. if acquired afterwards. Lev. 102. 2 Bl. 492. 4 Co. 64. 66. 10 Co. 49.

But the wife's right to the personal property is postponed to all these claimants, and the reason of the distinction is, that her title to the personal property does not arise until the husband's death. of course all these claims will be preferred to hers.

A seisin in law or a constructive seisin by the husband is sufficient to entitle the widow to dower. & provided he was not actually deprived it is enough.



But to entitle the husband to the curtesy there must have been an actual seisin. The reason of the distinction is that if there had been no actual seisin the children issue of him & his wife could not have inherited, for the ancestor was not seized. Besides "it is not in the wife's power to bring the husband's title to an actual seisin, but it is in the husband's power to do this with regard to the wife's land." (Inst. 31. 2 Bl. 131).

In Con. the wife is entitled to dower in that inheritable estate only of which the husband died seized. This rule was introduced by stat. & is peculiar to Con. Stat. Con. Dower. § 100. The words of the stat are that she shall be endowed in the inheritance of which the husband died possessed, and the word "possessed" has been construed to signify the same thing as "owned." so that our rule grows to be the same as the Eng. rule. And it has been further determined in Con. that the widow is entitled to dower in the inheritance which the husband owned at the time of his death tho he died actually seized. Now as the widow is entitled to dower in such property only as the husband owned at the time of his death, he may defeat her title by actual conveyance in his life time, yet he cannot deprive her of her dower by a deed in contemplation of death or by a devise.

In Eng. if a mortgagor in fee mortgages and dies, his widow is not entitled to dower because it is said the Equity of redemption is a mere equity.

able and not a legal estate. and yet if a feme sole mortgagor marries and dies. her husband is entitled to the equity. It should seem that if there were to be any distinction it ought to be in favour of the widow from analogy of reasoning as to dower in real estate or curtesy. - Modern chancellors have shown disgust at this distinction but it is too firmly established by repeated decisions to be removed by anything but the power of the legislature, 2 Atk 526. 1 ib. 606 3 P. W. 229. 1 Bl. Rep. 138. 161. 1 Bro. Cha. 326. Tabb. 138.

There is a solitary case to the contrary in which Sir Jo. Ashp. had the courage to depart from precedent. but it was soon overruled. 2 P. W. 700.

But if a man has mortgaged for years out of his inheritable property. marries & dies. his widow is entitled to dower in the residue subject to the determination of the mortgage. this you will observe is a dower in the residue not in the Eq<sup>y</sup> of redemption. Pow. Mort. 319.

In Com it has been determined that the wife is entitled to dower in the Eq<sup>y</sup> of redemption of the estate of her husband mortgaged in fee. & that her right is paramount to that of devisees and creditors.

Fisher v. Fish cont. 4 Com. 44. 1 Ro. 227.

By C. G. a wife forfeits her right of dower by a divorce a vinculo, and by virtue of H. West. 2 by an elopement. 1 Inst. 32. 2 Bl. 130. 137. 1 Roll. 680 3 P. W. 276. with an addendum. - 1 Cruise 174



An alien wife cannot be widowed, as if a citizen of Con. should marry an Eng. lady. for an alien cannot hold land. Such wives are however often widowed by a special act of the legislature. 2 Bl. 131. 136.

By C.L. treason in the husband bars the widow of her dower and the reason is that her children could not have inherited 2 Bl. 130. 136. seems in U.S. by the Constitution.

If the widow obtains the title deeds from the heir. her right of dower is not barred until she restores them. And if on a c<sup>th</sup> bet. to recover them she denies the fact and it is found against her. her right of dower is forever barred to punish her for false pleadings. Plow. 85. 96. 17. Per. sec. 356. 360. 5 Co. 75. 3 Bl. 136.

And if a tenant in dower alien the land in fee or for the life of a stranger. she forfeits her estate by stat of Glouc. 6 Ed. 1<sup>st</sup>. I do not see the use of this st. provision for by C.L. every tenant for life. except the case of husband who holds in right of his wife before mentioned would forfeit his estate. 2 Bl. 136. 7. 3 Bac. 230 for the C.L. rule see. 2 Bl. 274. 5. Lit. 415. Co. Lit. 251.

The wife

can bar her right of dower by accepting of a jointure before marriage. it being intended as a substitute for the dower. of this I shall speak hereafter. 2 Bl. 137. 8. 1 Bul. 173. 2 Bac. 140

She may also bar

her down. by joining with her husband in a firm  
or in suffering a common recovery of his in-  
alienable estate. This rule was before mentioned, but I will  
just repeat that its efficiency for this purpose is derived  
from this, that she is stopped by the need to own  
at a future time, that she was covent. 2 Mac. 139. 40  
10 Co. 49.

In Con. a divorce a vinculo does not bar  
the right of dower unless the wife was the faulty  
party or committed the act which occasioned the  
divorce. Or in other words, if the wife obtained  
the divorce on her own application it does not  
bar her right. Stat Con. 147. 349. And indeed  
our stat seems to imply from its phrasing that  
a woman living apart from her husband with-  
out his consent and without just cause is barred  
of her dower. St. Con. 349. 1 Swift. 255.

*Paraphernalia.* The wife is also entitled to certain  
articles of personal property called paraphernalia by  
which is meant something over & above her dower  
it consists of apparel bedding and ornaments, it  
is sometimes described as including only the first &  
last, but bedding is a part. It is sometimes  
difficult to distinguish between this species of prop-  
erty and other similar personal property which the wife  
holds to her own sole & separate use.

With respect to the  
effects of these two kinds of property I would observe that  
as to that held by the wife to her sole & separate use



the husband is an entire stranger. But as to some part of the paraphernalia this rule does not hold for the husband has a qualified control over it.

et qum prop.

ity to vest in the wife to her sole & separate use must be given to her sole & separate use, the intention to give for this purpose must be apparent, 3 Attk. 392.

But the wife's paraphernalia are not given to her sole & separate use. for if they were they would cease to be or rather not be paraphernalia. being beyond the control of the husband. altho the specific articles are of that class which constitutes paraphernalia.

This intention may be inferred not only from the terms of the gift or conveyance. but also from the nature of the property in some cases, & the circumstances under which it is given. Thus diamonds plate &c given by the husband father to the wife on the day of the marriage have been held to be property vested in her to her sole & separate use, tho the diamonds were property which she might have claimed as paraphernalia. - 1 Fort. 28. 3 Attk. 393.

So trinkets & ornaments given by the husband in his life time were considered as property to her sole & separate use & not as paraphernalia. but it is not easy to fix a rule by which it can be determined which is separate property & which paraphernalia tho the rights are in some respects different. 3 Attk. 393.

But if a husband bequeath

ornaments to his wife. they are not to be considered as property holden to her sole and separate use. for she takes them as legate. which goes on the supposition that they are his & not hers. of course they may be subject to his debts.

Property given by the husband to the wife in his life time <sup>merely as property only</sup> for the purpose of being worn as ornaments of her person are not regarded as her sole & separate property and of course she will not hold them against creditors. 3 Cttth 394. So they are to be regarded as paraphernalia.

For obviously he did not intend to give her the power to dispose of them.

That species of property which is called paraphernalia is of two kinds. The first is necessary apparel and bedding. the second consists of ornamental articles worn by the wife as jewels and trinkets in general. 1 Roll 911. 2 Bl. 435. 6. Com. Dig. Bar. & Pien. n. 3.

During the husband's life the paraphernalia of the second class are at his disposal. the wife's right to them is not considered as absolute as it is to those of the first kind which are necessary. those of the 2<sup>d</sup> are not. and he may sell them or pay debts with them. but he cannot bequeath them. 2 Cttth 77. 3 ib. 358. 395. 2 Bl. 435. 1 P. W. 430. Esp. Dig. 578. the authorities on this subject are not regarded.

But the wife's paraphernalia of the first kind cannot be taken by the husband's creditors. nor can the husband sell them. We have a case in the books of a husband being indicted for selling the necessary



apparel of his wife. 5 Bac 479 Prob. sec. 501. 2 Bl. 436  
Now the question as to what is necessary apparel and  
bedding in quantity and quality is to be determined  
by the circumstances of each case. for what might  
be just and reasonable in one case might be profusion in  
another. It is left to the discretion of the court and it  
may be a matter of consequence for the holder in dis-  
solution of creditors. It is however so far settled that the  
widow is entitled to one bed at least whatever her con-  
dition may be. Com. Dig. Bar & Fines. P. 3 1 Roll. 411

Paraphernalia of the 2<sup>d</sup> class viz. ornaments are liable  
to the debts of the husband on his death, not however  
entirely after the personal property is exhausted. for the wife's  
right to them is paramount to that of his represen-  
tatives or legatees. 2 Atk 104. 3 ib. 369. 395. 3 P.W. 730

And if the husband's specialty creditors take the wife's  
paraphernalia of this kind. she will be considered as a  
creditor of the him at law for so much in ac-  
count as they took. provided he has an estate  
of inheritance or real assets to that amount. for  
the creditors had a right to the land. And it seems  
that the right of the widow to even this second  
kind is paramount to that of the him at law  
to his inheritance 1 P.W. 730. 2 Atk 77. 104. 3 Atk  
369. 2d!

A settlement or jointure given to the wife before  
marriage & if proper to be in bar of all demands  
on the husband's estate bars her right to the 2<sup>d</sup> kind

And a settlement made after marriage if in pursuance of articles entered into before marriage & expressed to be in full of all demands as before has the same effect. So in either case she cannot claim the second kind. but it does not deprive her of her right to those of the first 2<sup>nd</sup> 642 2<sup>nd</sup> 83. 49.

If the husband creates a trust estate in lands for the pay<sup>t</sup> of his debts. and the simple contract creditors even. take the paraphernalia. the wife can come upon the trust estate for them in Eq<sup>y</sup> 2<sup>nd</sup> 642 105 3<sup>rd</sup> 348. 430. Com. Dig. Bar. & Finner F. 3.

And in all these cases where the widows paraphernalia have been taken for the pay<sup>t</sup> of debts. her claim in Equity is the same against the devise of the husband as against the heir at law if there had been no will. for her claim is preferable to that of all men volunteers. 3<sup>rd</sup> 395. 1<sup>st</sup> P. W. 730.

If the husband pledges the paraphernalia of the 2<sup>nd</sup> kind (of which I am now speaking) the wife on his death & not his Ex<sup>r</sup> has the right of redemption. If there is a surplus of personal property after pay<sup>t</sup> of debts she is entitled to that surplus to enable her to redeem & this right she has even to the exclusion of legates. 3<sup>rd</sup> 395.

The wife's right to claim property as paraphernalia against a disposition of it by the husband is strictly personal and not transmissible to her rep-



Altho' the husband's  
debt to the wife for life  
remains over the  
acquired interest  
thru' as legatee, with-  
out claiming the  
as far as they went  
to the remainder  
man. I met to her  
refuse.

representations. Suppose he bequeaths them to her as a gift  
and his heirs representations cannot claim them, the  
benefit is his & exclusively hers, and if she subverts  
to a devise, her representatives cannot set it aside.

2 Vern. 246. 7. Cro. Ch. 343. to 346. 1 Roll 911

In Con all  
the property of a deceased debtor is liable for payment  
of all his debts, both by simple & special contract.  
it would seem then that an Ex<sup>r</sup> could not take the  
widow's paraph<sup>a</sup> to pay debts, unless both the real and  
personal funds had been previously exhausted. I also  
think that if Ex<sup>r</sup> takes the paraph<sup>a</sup> to pay debts, he would  
immediately become liable simple he had before ex-  
hausted both. These cases have never come up for adju-  
dication. - But the rule appears to be, that the fund  
of both personal & real estate has the same relation  
to the wife's rights of paraph<sup>a</sup> in Con. that the  
personal estate merely has in Eng.

The Conn<sup>t</sup> Stat. has  
made an additional provision in favour of the wife  
unknown to the C. L. for beside the usual one under  
the stat. of distributions the judges of Probate are to  
allow to her a reasonable amount in household goods  
when the estate is insolvent, and this provision has  
been extended to cases of solvent estates, and the  
practice is to allow in any kind of goods beside house-  
hold goods, as books carriages &c. 11 Con. 275. 6. 280

Of the husband's liability on the wife's acct.

I would here remark that the husband & wife are jointly liable in three ways. first. for his debts. 2<sup>d</sup> for his torts and 3<sup>d</sup> sometimes for his crimes.

As to his debts. For the debts of the wife contracted while sole, the husband and wife are jointly liable during coverture: the husband's liability in this case however ceases on her death unless judg<sup>t</sup> has been recovered against them during their joint lives. 1 Bl. 443. 1 Bac. 293. 307. 1 Roll 357. Coote 30. 7 T. Rep. 328.

The reason why it ceases with the coverture is that it grows out of the relation in which the husband stands to the wife and it ceases of course with that relation. But if judg<sup>t</sup> has been recovered against them during coverture, the husband continues liable, for the judg<sup>t</sup> attests the debt by converting the wife's equity into one against the husband. *ib. sup.*

After the wife dies first and no judg<sup>t</sup> has been obtained the creditor must lose his debt unless she has left assets for the liability of the husband as such is ended. 1 Inst. 357. 1 Bl. 443. Christ. notes. 1 P. W. 468. 3 ib. 409. Esp. Dig. 122.

But if the husband died first & no judg<sup>t</sup> against them had been recovered the debt survives exclusively against the wife. the husband *et c.* is not liable. for the husband's liability as before observed & that of his representatives, for such debt, ceases with



the coverture. 3 D. W. 409. Esp. Dig. 122. 7. T. Rep. 349

The principle of the husband's liability appears to be that as the wife loses all title to a great part of her personal property and all control over the rest. She cannot discharge her own debts and save herself from arrest and imprisonment and it is the rights conferred upon the husband that effects all this. 1 T. Rep. 486. 1 Bac. 292. 1 Roll 532.

And upon this principle it is that she cannot be taken alone in a civil action on mesne process during coverture, as for debt or tort. and if she is, she is to be discharged on common that is nominal bail on the security. Ino. Soc. & Richd. Row. 1 T. Rep. 486. 2 Bl. Rep. 720. 728. 1 Wils. 149 3 ib. 124. 2 Ray 73. Corn. Dig. Bar. & Fenn. 9.

If however an action is brought agt. a feme sole & she marries pendente lite. she continues liable to be holden alone for the process commenced lawfully and the law will not suffer the Plff to be thus defeated of his action by the acts of the Deft. the suit in such case must go on precisely as if she were still a feme sole. Co. Jo 423. 4 Bac. 40. 3 Bl. 414. Esp. Dig. 328. 1 Fel 314.

In this case however the Plff may have Ex<sup>ca</sup> against her alone, or he may at his election, having recovered judgment have a scire facias on that judgment and have Ex<sup>ca</sup> against both. Cault. 30. 3 Mod. 170. 1 Fel 315.

If both are taken

on same process for the debts of the wife. She is discharged in common bail, and the husband remains in custody until he puts in bail for both. The reason of her discharge is the same as when she is arrested alone viz. that she cannot indemnify the bail and this in consequence of the marital rights. 2 Bl. Rep. 720 Stra. 1272. 1 Vent 49. 1 Geo. 57. 216. - I think the rule is contradicted in one of these authorities but it is firmly established. see 1 Sw. Dig 30.

A woman will not be discharged in a summary way as upon motion, as she is when arrested alone unless the coverture is notorious. indeed if it is, the Plff ought to discharge her immediately. If it is not notorious as in case of secret marriages she is left to plead her coverture.

Still less is she entitled to discharge when sued as feme sole if she has imposed upon Plff by pretending to be sole. for the application for discharge is to the discretion of the court. & they will never grant it in such case. 2 Bl. Rep. 720. 903.

It is common  
a wife when arrested as a feme sole be thus discharged if her husband is an alien living without the reach of process. tho she may indeed plead her coverture and finally avail herself of it. Salk 646. 2 Bl. & P. 233. 1 et Rep. 81. 2 ib. 380.

But if a feme covert is arrested alone on final process or *Ex m. coram* against herself & husband, she can in no way



procure a discharge unless it appears that there was collusion in the husband to get rid of her company. because in final process there is no such thing as bail. the arrest is not to secure appearance, but is a sort of satisfaction, or a coercive method of obtaining satisfaction. so she may be imprisoned until the debt is paid. *Ista.* 1167. 1237. 3 Wils. 124. 2 Bla-Rep. 720. Esp. Dig. 327. 15 L. 486. 1 Sw. Dig. 30.

The husband's liability for the torts of the Wife. The general rule is that the husband is liable jointly with ~~with~~ the wife during coverture, for her torts committed while sole & also for all torts committed by her alone without his direction or consent during coverture. 3 Bl. 414. *Ista.* 1237. 1 Wils. 149. 1 Bac. 295. 207.

But for torts committed by the wife by the husband's command tho in his absence, or by the husband & wife jointly, or by her alone in his presence, the husband alone is liable, the act being considered as the sole act of the husband, the wife being deemed to have done it thro the influence or aid is not the coercion of the husband. 2 Bl. 28. 1 Hawk. 344. Cro. Eliz. 254. 355 481. 1 Roll 328.

When they are jointly liable for torts during coverture, she continues liable after his death, for in such cases (specified above) the act is done, both in fact and legal contemplation by the wife and by her alone. Thus, she commits a tort while sole married and the husband dies she is still liable. & the rule is the same if she commits a tort without the knowledge or consent of

her husband. for he is not considered as having committed it in either case. and he must be sued with her during coverture. surely because she is not liable to be sued alone. Palm. 313. Cro. Ch. 366. 519.

And the husband's liability for her torts ceases with the coverture. i.e. when she has committed a tort for which they are jointly liable during coverture, and for the reason that I gave yesterday of his liability for her debts ceasing with the relation that produced it. Cro. Ch. 374.

As to Crimes committed by the wife the husband is in some cases liable alone in others jointly with the wife.

In cases of bawd theft committed by the wife thro his coercion or in his presence he alone is liable the act being deemed his. the coercion alone releasing her? 1 Hale Pl. Cr. 65. 45. 1 Hawk. 4. 4 Bl. 28.

But if the wife commits such an offence voluntarily or in the husband's absence, <sup>tho</sup> by his command she is liable alone for it is a public offence. 1 Hawk 4. Keling 31. 4 Bl. 29. 1 Hale. 65. In case of burglary.

And the same distinction is said to hold in the case of burglary. he being alone liable if the act were done in his presence or by his coercion. but if it were voluntarily done or by his command in his absence she is liable alone in civil as in the case of theft. The rule is differ-



ent in the case of torts, the acts being civil & the acts of which we are now speaking public offences. 1 Hale 45 Keylings 31. 2 Bl. 28.

But for mere misdemeanors, that is offences falling short of felony, committed by both, both are jointly liable. 10 Mod. 63. 335. 1 Hawk 345. 2 Bl. 29.

It may don't little seem strange that the presence or coercion of the husband should excuse the wife in the commission of theft or burglary and not in the commission of a misdemeanor. It may however appear less unreasonable if we revert to the C. L. rule as to the benefits of clergy. For if both were convicted of theft or burglary the wife would be executed & the husband escape with burning in the hand for by C. L. a woman is never allowed the benefit of clergy. It might have been then that this distinction was admitted to avoid the incongruity of this C. L. rule. 4 Bl. 29. Ch. notes.

But for higher felonies as treason murder & robbery committed by them jointly, both are liable, although the husband should have used actual coercion, for coercion will not excuse such enormous offences. So that the wife's liability for the higher kind of felonies and for misdemeanors is precisely the same. 1 Hale. 65. 1 Hawk 4. 4 Bac. 29. Stra. 1120. and if she commits any of those offences alone she alone is liable. ib. ante. no. 1 Dal. P. C. 47.

But if the wife by her own sole act incurs the penalty of a penal statute, the husband is bound to pay it. ~~the~~ the wife commits the offence alone and without his privity. in such case the husband is liable jointly with the wife & he must be made a party to the action or information. But in cases of misdemeanor or felony she is to prosecute alone. for by the principles of criminal law the punishment can act upon her alone. When however the punishment is pecuniary the husband must be joined because he is to pay. the law deeming the wife incapable by means of her coverture. Indeed the penalty is considered in the nature of a debt & upon that technical reason the husband must be joined. 1 Hawk 5. 2 Bac. 294.

If a wife moves & conceals her husband who has committed a felony she is guilty of no offence, is not an accessory after the fact as a stranger would have been, this exemption is said to be founded upon the authority or supposed coercion of the husband. I apprehend however that it arises from the indulgence which the law shows to this relation of husband & wife. 1 Hale. 44. 2 Hawk 451. 1 ib. 4. 4 Bl. 389.

as to all cases to which the exemptions as stated above do not apply or extend, the wife is liable for crimes committed by herself, precisely as if she were sole. 9 Co. 72. Not. 93.



3 Feb. 34. Cro. J<sup>d</sup> 482

Of the power of the wife to bind her husband by her contracts made during coverture. This power of the wife is said to be founded in his assent express or implied and this assent is implied from his duty in certain cases. Salk 118. 6 Mod. 239. 1 Bl. 430

This principle in certain cases is perhaps rather too narrow for the husband is sometimes bound when he expressly refuses to be bound & it seems straining the theory to say that his obligation is founded in assent when there is an express dissent. Now may it not be said that this assent is nothing more than an attempt to revoke a former assent? Thus, if he has refused to provide the wife with necessaries, she may procure and he is bound to pay for them but he would not be bound to pay for anything but necessaries in such case. 1 Bl. 442. 1 Sid. 120. Salk 118. Esp. Dig. 122. 14 Bl. 328.

It is clear then that his actual assent is not necessary in all cases to his liability on her contracts and it is equally clear that his dissent will not in all cases avail him. The more obvious theory or principle on which to account for his liability seems to be that he is bound as husband to provide her with necessaries suitable to her rank and condi-

tion. The rule however remains the same ~~to~~ what  
 will have been the origin of it, and it may  
 be said that from his duty the law implies  
 an assent which he is not at liberty to deny.  
 or in other words, this implication is not re-  
 butable. I see no reason for resorting to assents  
 when he is liable on the ground of duty.  
 1 P. W. 182. Galk 118. 2 G. & L. Exp. Dig. 122. 124.

The particular cases in which the wife may  
 bind the husband on the ground of a ~~contract~~  
~~assent~~ are. 1<sup>st</sup> When there is an express assent  
 before the contract. 2<sup>d</sup> When his assent is im-  
 properly given afterwards. 3<sup>d</sup> When the wife has  
 usually provided certain articles for the family  
 & he has been in the habit of paying for  
 them, and ratifying the contract, this giving  
 us one example of an implied assent ante-  
 cedent. & 4<sup>th</sup> When the articles purchased  
 by the wife come to the use of the husband  
 or his family, which is an instance of implied  
 assent subsequent.

In those cases it may be fair-  
 ly said that the husband has assented and  
 there is no need of technical reasoning or fiction  
 to explain the liability. 1 Bl. 429. 1 Roll 350  
 1 Gild. 120. 128. 3 East 333.

State these cases by  
 themselves for the purpose of remarking that  
 in those the wife acts strictly as a servant or



agent of the husband, who appears in the character of master or employer. for in truth any other person might bind the husband in this way. So it is not from the relation of husband and wife that this liability arises. 1 Bl. 430. 1 Sid. 120. 126. 1 Vent. 155. Cha. 1214. 1 Salk

118

It will be found true then that as I remarked before, the wife as such can bind the husband by no contracts of her own except for necessaries. And after a general license or credit has been given as in the 3<sup>d</sup> case above, it cannot be determined by a private prohibition, that is it will not bind his liability. The credit is only to be withdrawn by such notice as is consistent with the credit, for otherwise third persons would be defrauded. 1 Show. 75. 2 Vern 623. 1 Bl. 438.

If a wife not having general credit purchases cloaths and provisions without having worn them, the husband is not liable for them, but if she had worn them, it is supposed that he knew of and assented to the purchase as the goods came to his use. But if they come not to her use, which is his use, he is not bound. His liability depends then it seems upon the fact of her having worn the cloaths. Salk 118. 2<sup>d</sup> Pay. 1006. 1 Bac 300. Esp. Dig. 130. 133. New ed. com.

Upon the same general ground of distinction it is that the hus-

bands pivity in pawns before or after wearing  
and borrows money to redeem them the hus-  
band is not bound to pay it. for borrowing  
money is not a contract for necessities. the law  
now suffers the wife to borrow money without  
husbands consent. so in Eng. such a claim is  
enforced against him. 2 Show. 253. 1 P.W. 183  
1 Roll 350.

If a husband turns away his wife he  
is liable at all events for her necessities unless  
she is guilty of adultery. that offence is a suffi-  
cient cause for turning her away and in  
such cases he is never afterwards liable for her  
necessaries. 6 T. Rep. 606. 4 Burr. 2178. Talk 119. Stra  
875. 1 Pau. Con. 139. 1 B & P. 226. note 339. 1 H. Bl. 368.

But if  
he turns her away without such cause, no prohi-  
bition whatever, however general or special  
will avail him or sever his liability for her  
necessaries. Ld. Holt says that it is his assent in  
such cases that binds him. there is no inconsis-  
tency in such a theory. truly the fact is that  
it is the husbands duty and he cannot by  
a wrongful act of his own avoid a liability  
that he has voluntarily taken upon himself  
Talk 118. Stra. 1214. Esp. D. 124. 1 Esp. 441. 1 Sw. D. 34

If a man lives with a wo-  
man as his wife allowing her to assume his  
name and appear as his wife. according to  
the distinctions already taken he is liable for her



meritaries. So a plea of "never lawfully married" to an act. brot. against them is no bar if they were married de facto. 1 Sw. 41. 1 Sid. 13. 6 L. 387. 4 Bul. st. P. 136. Talk 437. 1 Dec Bar & F. 2. Ed. 1. P. 313. 296.

To allow the husband to avail himself of this plea would be a gross fraud upon the public for he has induced the public to believe her his wife & is as much liable as if he had gone directly & told the traders around that she was his wife. 1 Sw. N. P. 296.

The rule is the same as to actions founded on tort, but is the force ag. them. Coult. 131. 437. 1 Dec. 1387. a.

And the rule is the same in case of an act. brot. by husband & wife to recover a debt due to her. the deft. cannot plead that they were never lawfully married, indeed that plea can never be good in any civil action except in an act. for dower. Bul. st. P. 136. 1 Sw. 41. Esp. Dig. 125.

When a husband and wife part by agreement and the husband allows her a separate maintenance, he is not afterwards bound for her necessities, i.e. after the fact becomes known in the place where he resides. for such a known separation is a revocation of the credit which the relation gives the wife on his act. and those who trust the wife after this do it upon her own credit and not that of the husband. And before the facts become known he continues liable, altho there may have been an actual private separation. 2 Ray. 444. 1006. Talk 116. 6 Mod 147. Esp. Dig. 126. 1 Sw. N. P. 290.

But when the wife lives separate from

the husband under such a agreement, but has no  
 separate maintenance <sup>or if allowed not paid</sup> allowed <sup>for</sup> her. He is still liable,  
 for if the man & wife could by agreement discharge him  
 of his duty they would be guilty of a plain fraud  
 upon the public. the wife not having any means  
 of discharging her debts. — 4 Burr. 2078. 6 T. Rep. 654.  
 Esp. Sig. 126. 7. Sel. Ct. P. 291. 2.

If the wife elopes with a stranger the husband  
 is clearly not liable after the elopement becomes noto-  
 rious. and the authorities say that he is not liable  
 even if it is not notorious. But this I think ques-  
 tionable upon principle for the public ought to be  
 informed or they are liable to be defrauded. It is  
 however law. Salk 110. Stra 667. 706. 1 Lev. 8. 1 Bl. 442. 3  
 6 T. Rep. 603. 1 Ann. Pl. 348. 2 Key. 44. 1 Sel. Ct. P. 289. 90.

The principle of this rule  
 is that by such act the rights of the wife are forever  
 forfeited & she can never after claim a mainten-  
 nance so that the husband is forever discharged  
 of course if she should propose to return & he refuse  
 to receive her. he is no more liable after refusal  
 than before, for he is under no obligation to receive  
 her. 1 Bro. & Pul 339. 6 T. Rep. 603. Stra. 875. Sel. 288.  
 289. 90. 93.

and it  
 seems to make no difference whether the elopement  
 be adulterous or not if it is notorious, for if she  
 is guilty of no offence but the elopement still he  
 is not liable for her necessities. 1 Pow. Con. 96. 1 Lev.  
 5. 2 Stra. 875. Salk 118. Sel. 290.

If after an elopement not adul-



terous she offers to return, and he refuses. He is liable for her necessaries as he is bound to support her afterwards for such an elopement is not a perpetual forfeiture of her rights. Esp. Dig. 125. Sta. 875. 1 Bac. 299. 300. Salk 119. Sid. 293. 4<sup>th</sup>.

In this case therefore a general prohibition to all persons not to trust her on his account will not avail him, but a special prohibition to one individual will, for tho he is bound to support her yet as she has been guilty of such an offence, she is not at liberty to choose his creditors for him. 1 Liv. 4. 1 Sid. 109. 2 Burr. 2177. 1 Bac. 296. Vico. Sel. 294.

If a husband leave his wife and children at his own house, not having provided for them, he is liable for her necessaries altho she has committed adultery provided the party furnishing did not know of the adultery, for by thus leaving her in this situation he gives her prima facie a credit. This however is rebutted by the party knowing the fact of adultery. 1 B & P. 226. Sta. 647. 706. 6 T. Rep. 603. 6 Mod. 171. Salk 114. Sid. 296.

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But the husb<sup>d</sup> is not liable for her necessaries during elopement, neither is the wife liable, and has indeed been often determined that if it was adultery she is liable, this however is questionable but it is clear that if it is not adultery she is not liable, and the reason is that it does not bear the husband's rights. 2 Bl. Rep. 1079. 1 Pow. Con. 96. 8 T. Rep. 547. Sta. 875. note. Esp. Dig. 125.

Although the husband is bound to provide necessaries for the wife, yet if he does provide them at home he has a right to prohibit the public as well as an individual to trust him at all, & he may thus secure himself, for if he provides the law is answered & he may thus terminate any credit that he has already given him either with the public or an individual. it is only when he refuses to provide the necessaries that he is liable on his contracts for those made by his direction. - 1 Ld. 5. 1 Sid. 109. Ld. Ray 444. 1006. Salk 118.

But on the other hand if he refuses to furnish necessaries, she may procure them & he is bound to pay for them for he cannot deprive her of them. 1 Bl. 442. Esp. Dig. 122. Salk 118.

If a

husband turns away his wife without sufficient cause he is bound for her necessaries purchased against a genl. <sup>even</sup> special prohibition, for his liability remains & she may purchase when she pleases, & I trust the rule must be the same if she leaves him for any cause that will justify a departure, or which makes it improper for him to remain with him 2 Sha. 124 12 Mod. 244. Salk 118. 19. Id. 294

I observed yesterday that the husband is not bound to repay money borrowed by the wife, the law leaving it at his election to employ her in such business or not as he pleases. But if she does borrow money and actually expend it to purchase necessaries he may be liable to re-



found to the amount of those necessaries in Chy.  
 but not at law, for at law the contract is good  
 or bad ab initio and is not affected by any thing  
 subsequent facts, and no infirmity could be had to the appli-  
 cation in an act at law. But in Chy. the lender  
 stands in the place of the vendor and is allowed  
 to recover to the amount of the value of the neces-  
 saries furnished, and no further. If the wife in such  
 case then pays \$100. for the worth of \$50. he will  
 only be bound for \$50. indeed he is really bound  
 in quantum valuit. Talk 279. 387. 1 P. W. 433.  
 In Cha. 502.

I have observed that if husband & wife <sup>by deed</sup> joint  
 & the wife has a separate maintenance, he is not liable  
 for her necessaries after separation becomes notorious.  
 But if in this case he does not pay the stipulated  
 allowance he is liable upon his subsequent con-  
 tracts for necessaries, for the condition on which he  
 is to be exempted is broken & of course he continues  
 liable the same as if there had been no such  
 separation 2 N. Rep 148. Feb. 2901.2.

Now far the wife can bind herself or her prop-  
 erty by her own contracts.

The general rule of C. d.  
 is that a wife cannot make herself liable upon  
 any of her contracts, altho she can bind her  
 husband. Her contracts being regularly con-  
 sidered as void. The reason usually assigned  
 for this rule is that her existence is merged in

that of her husband, that she has no will of her own separate from his or that she is not a free agent. 10 Co. 42. 1 Roll. 347. 1 Bl. 442.

The true and more obvious reason appears to be, that as the law has deprived her of her property or of all control over it, it is her privilege not to subject herself or be bound by her contracts. The original reason is founded in her disability, now it is not so much her incapacity or her privilege, for her incapacity is occasioned by the marital rights of the husband. If she could bind herself by her own contracts, she might subject her person to arrest & imprisonment & thus the rights of the husband would be infringed. The old reason appears to me theoretical & fictitious, for suppose she makes a contract ag<sup>t</sup> his express will it appears reasonable, with this knowledge of the facts to say that she cannot have a will of her own. 1 B & P. 359 1 New Bl. 336, 345. b. 1 Pow. Con. 101.

And under this general rule the contract of a <sup>covert</sup> feme (sole) is not only invalid at C.L. but it is actually void, and the distinction between void and voidable is very important — a void contract cannot be justified, a voidable one may be, any one that is affected by a contract that is void may set it aside, but one merely voidable can only be taken advantage of by the party or his representatives. 2 Bl. 293. 2 P. Wm. 144. Tulk 7. 1 Pow. Con. 90, 97.

It follows then



as a general rule that if a feme covert makes a contract and when she attempts to or attempts to ratify it, it is still void, for that which is void ab initio cannot be made valid by any thing ex post facto.

But consistently with this rule, if a feme covert delivers a deed, and then after her husband's death redelivers it, it will be valid taking effect like a new deed from the second delivery, its existence as such commencing at that time. This is an exception to the rule, for it is a new recitation and it becomes from that moment a new deed, for every deed takes effect from the delivery that is the legal delivery. It does not operate as a ratification for the deed does not take effect from the first but from the second delivery, & it gives title only from that time, the first delivery being considered as mere nullity. Cowp. 201. 4 Cr. Dig. 20.

But the true rule is that her contracts are void after the case of a lease by a feme covert is an exception to it, for her leases are but voidable and is made so for the encouragement of agriculture, she may avoid the lease if she will it is true, & from that time the lessee is a trespasser, but this not for entering under such lease. Cowp. 203. Doug. 53. 2 T. Rep. 776. 2 ib. 478. 2 P. W. 127. 1 Fon. 131.

It follows then that if she makes a lease during coverture, she may ratify it after her husband's

death by her apert mndy or by doing any act that  
recognises the relation as by accepting rents and she  
cannot afterwards void it. And the rule is the same  
if the husband & wife join in a lease of the wife's  
land for life or for years at C. L. (By stat however  
husband & wife are allowed to make valid leases of  
the wife's land for 21 y<sup>rs</sup>) 2 Saund. 180 note 9.  
1 Keb. 225. 1 Roll 349. Cro. J<sup>r</sup>. 563. Chit. Pl. 43. 1 Bac  
302.

If then after the death of the husband she ratifies  
that lease, she then becomes liable upon all the cov-  
enants that are contained in the lease, as to repair.  
1 Mod. 291. Cro J<sup>r</sup>. 563. 4. 2 Saund. 180. note 9.

And if a  
lease is made to a husband & wife, and after the death of  
the husband she aperts to it, she from that time becomes  
liable for such covenants as run with the land as rent,  
but not such as are collateral or personal as to build a  
a house or a wall. 1 Chit. Pl. 43. 1 Roll 349. 2 Saund 180. n. 9

When a deed is made to a feme covert it is in gen<sup>l</sup>  
only voidable by her. Conveyances entered into by her  
are in gen<sup>l</sup> void. those in her favour only voida-  
ble. for there are not prevented taking effect by her rela-  
tion to her husband. they being supposed gen<sup>l</sup> for her  
advantage. and after her husband's death she may  
waive or ratify; and if she waives the deed will  
enure to her husband's representatives. as enure to him  
alone would Com. Dig. Bar & Fem. Pl. 1 Roll. 349.

If husband



and wife are made tenants in common. she may dis-  
agree after his death and then the whole title will go  
to his heirs or representatives as in the case before supposed  
it are. 3 Co. 27. 8. 1 Roll. 349

Tho if the conveyance to the  
husband and wife is of a freehold, her waiver must  
be made in a court of record, to be effectual. this is  
required from the high regard the law has for a  
freehold. no such solemnity however is required to  
confirm her title. a mere entry is sufficient. 3 Co. 26

If an estate be limited to a husband & wife & to a stranger.  
the husband & wife take but one moiety, the stranger  
the other, whereas if all were strangers each would take  
equally. this rule is a consequence of the legal identity  
of husband and wife who form but one person. Lit. 291  
Co. Lit. 187. 8. 327.

And if real estate is conveyed to hus-  
band & wife by words that in other granters as  
strangers would create a joint tenancy, they hold  
an estate that is one severalty in the law, for  
they do not take as joint tenants or tenants in com-  
mon. they hold by entireties and not by subdivi-  
sion. and since the husband cannot by his own act  
alien any part even his own, nor can he sever the joint  
interest, for the law will not allow him to deprive her  
of the chance of taking the whole by survivorship.  
2 Geo. 39. 1 Inst. 187. 9 Co. 140. 2 Vern. 120. 5 T. Rep. 654  
as this rule is founded on the legal identity of the par-  
ties, as the former enures.

A free court can make a valid conveyance of land in performance of those conditions under which the land was ~~in~~ in her and this is to prevent mischief that she be not injured by her privilege. As if lands are given to her provided she conveys an half to her son. a conveyance by her would be necessary to prevent a forfeiture of the whole. 2 Cur Dig. 21. Com. Dig. Bar & Fem. P143.

And since Chy. permits the wife to hold separate property she may now by her contracts bind the property thus holden, during coverture and even while she lives with her husband. For this authority does not affect the husband's rights as he has no control over the property, and besides it would be absolutely inadvisable if she could not dispose of it. 1 Fon. 90. 91. 1 Vy 517. 1 Bro. Cha. 16. 6 Bro Par Ca. 156.

Her contracts in relation to this property do not bind her at law so of course her person will not be liable to arrest and imprisonment for the breach of them, so that the husband's rights will not be violated. Her separate property only is bound and that only in Eq<sup>y</sup> and here there is no danger to her privilege or the rights of the husband for Ch<sup>y</sup> acts in rem and not in person at all. 2 Vy 190 2 Attk. 379. 1 Pow. Cont. 188. 103. 1 P. W. 144. 1 Hen. Bl. 344 2 N. Rep 162

And even altho the property is vested in trust for her separate use, she may dispose of it in Eq<sup>y</sup> without their intervention unless the instrument by which she holds makes it necessary for the equitable interest is all her own. 2 Vy 190. 1 ib. 517. 1 Pow.



Contracts. 50. 61. 1 Fent. 103. 110. ch. 1. 19. 20.

If the husband is banished by law or has absconded the wife or is transported for an offence or is an alien enemy, he is considered as civiliter mortuus, and his wife as a *feme sole*, there being no sufficient reason for considering her a *feme covert* upon the score of her own marriage or that of the husband's rights. This is a C. L. rule and it may be necessary for her very subsistence. Hence she may bind herself by her own contracts, may sue & be sued alone precisely like a *feme sole*. 1 Pow. Con. 75. 77. 2 A. Ray 147. 1 Inst. 132. 4. 133. 1 B. & P. 557. 1 Ken. Bl. 326. 1 Salk 116. 646. 2 B. & P. 231. 2 Esp. Rep. 554. 587. Id. 4. P. 297. de.

The rule has been holden to be the same when the husband is a foreigner, has remained abroad for years without returning, he being considered as having absconded the rule. There is however but one decision to this point 1 B. & P. 357. 1 Ken. Rep. 80. 11 East. 304. notes. 2 B. & P. 233. 2 Esp. Rep. 554. 587. Id. 300.

So also in case of a divorce a mensa & thoro for by C. L. she can bind herself by her contracts, sue & be sued alone precisely as if she had never been married. 1 Pow. 75. Moon 666.

The question however, as to, within what limits the rule regarding the wife as *feme sole*, is to be restricted, has occasioned a vast deal of litigation in the courts at West-

minutes and there was a great diversity of opinion among the judges & the profession.

The following were cases in which the wife by agreement lived separate from her husband, on a separate maintenance, regularly paid.

Barwell & Brooks, in this case it was determined that the wife might bind herself at law, altho the husband was within the realm. 1 Pow. Com. 72. 159. In Lady Lamboroughs case, the wife lived in Eng the husband in Ireland, the wife was holden personally liable. - Both these actions were for necessaries furnished. Est. Dig. 126. 1 Pow. Com. 78. 2 Bro Cha. 385.7. In the case of Corbett & Poolemy it was determined that the wife may by C.L. bind herself to the extent of her contracts, whatever they might be, whether for necessaries or not, just as the wife as to the mere house of contracting precisely in the situation of a feme sole. 1 T. Rep. 5. 1 Pow. Com. 81. On the case of De Gaillon & L'edigh, when there was no separate maintenance the wife was holden liable at law on her contracts, because the husband was abroad and the wife traded as a feme sole. 1 Bro. & Pul. 357.

Of these cases that of Corbett & Poolemy goes the farthest, but it is overruled by the case of Marshale & Rutton. 8 T. Rep. 545. Judge Rive does not think that this latter case necessarily overrules the former tho he allows that the reasoning of the judges does it. It is shewn however that they intended to over



rule it. This latter case was decided after full discussion and examination of the preceding cases by the twelve judges — 5 Tiv. Rep. 682. 2 ib. 766. 6 ib. 605. 1 Bro Cha. 377. 1 Hen Bl. 633. 4. 334. 347. 8. 350. 2 Bl. Rep 1079. 1195. 1 Esp. 6. 2 Ct Rep 148. & I give examination of all these cases and the circumstances of each would be interminable. and I state it to be wholly unnecessary for I state it that if an determination can overrule another. than of Corbett & Poole v. Barwell & Brooks. Lady Lamborough Deqaillon & L'Esigle are not to be considered as law. The present Ld Ch. Justice considers the point as settled and it cannot now be considered as open for discussion. 8 Tiv. Rep 545. 2 Bro. & Pol. 226. 9 East 471. 11 East 301. 2 Ct Rep. 163. 1 Sel. 27.

For myself I think that a free court cannot bind herself on her contracts for necessities altho she lives separate and has a separate maintenance. — And her real estate is not liable even in Eq. except by virtue of an agreement on her part to subject it. 2 Ct. Rep. 163. 1 Ky. 517. 1 Bro Cha. 16. illud. 302.

But her separate personal property and the profits of her separate real estate may be applied in Ch. to discharge her general personal contracts. I would here remark that there is no decree showing a right to act upon the wife personally as by way of humanity it acts upon her property but never upon her person. 1 Bro. Cha. 21. 2 Ct. Rep 163.

I state then as the result of all

these cases, that when there is a separation and a separate maintenance allowed the only remedy of the creditor of the wife is in Equity. For that court can give a remedy against the particular husband.

Neither in Eq<sup>y</sup> or at Law is the agreement of separation considered as perpetual, the interests of community require that they should be considered as revocable, and altho it may be said that the woman is a jure sole defacto, and that the husband has voluntarily surrendered his rights, still the policy of the law will not suffer her to render herself personally liable. This is the reason why a creditor must resort to equity for redress when a jure covert can be sued as a jure sole. for as the law does not recognize the subject matter to be affected, 1 Pow. Com. 103. & T. Rep. 545.

A jure covert without a separate maintenance has never been considered liable either at Law or in equity. it has never been determined that the wife is if she lives in a state of adultery, but laying that offener out of the question there is no doubt as to the rule. 2 T. Rep. 766. 5 ib. 682. 6 ib. 604. 1 B & P. 338.

If a jure covert alone, Lewis a fine or as the court of authorities is, suffering a recovery of her estate, she is bound by it, tho the husband may afterwards defeat it, if he is entitled to the contrary. This is by C. G. and the reason of the validity is that she is obliged by the record to plead her coverture. Hence the title passes by way of estoppel.



on this subject see. 2 Bro. Cha. 386. 1 Pow. Con. 22. 2 Co.  
74. 78. 10 ib 43. 1 Stm Bl. 341. 1 Bac. 301. 2. It has  
indeed been doubted whether the wife could mortgage  
her own land by fine, i.e. by recovery. because of the difficulty  
of making a tenant for the purpose. but the prevailing  
opinion is that it will thus pass 1 St. Bl. 341. 1 For 300  
1 Inst. 336.

And if the wife does buy a fine, she is liable  
on the warranty of it, after the husband's death, before  
that he can defeat it if he pleases. 1 Sid. 466  
1 Bac. 312. 1 Ch. Pl. 43

But if he joins with his wife it is  
binding upon both and their representatives, ab initio  
for both are parties to the deed, and are estopped to aver  
anything against it. 10 Co. 43. 1 Bac. 302. 2 Roll. 345.

These methods viz. by fine or recovery were the only way  
in which a freehold could be aliened in husband and wife, or  
by which it could be aliened by C.L. But now  
she can do it by executing a power over a use  
& this will now as well as in Egl. & land in Egl. she  
may also do it by declaration of trust, which I  
shall speak of hereafter. — The wife may under agt.  
made before marriage for settling the estate in trust  
subject to her appointment, tho it is not absolutely made  
Absolute then methods merely to qualify the rule.  
2 T. Rep. 695. 1 For 300. 1. Pow. Dev. 650. 165. 2 T. Rep. 695  
2 Ry. 190. 191. 6 Bro. Par. Ca. 153. 163. 4. 180

If a freehold  
having separate estate permits her husband to take the

rents & profits of her real estate & the interest of her personal. she is considered as having abandoned them to him. this however is an equitable presumption & may of course be rebutted by parole testimony  
1 Attk. 269. 2 P. M. 87. 1 Pow. Con. 422:3.

Affirm

court cannot devise her real estate under the Eng. Stat. of wills. 32 & 34 Hen 8<sup>th</sup>. The first of these calls the Stat. of wills gives power to "all persons" holding certain estates to devise them. the last which is explanatory, declares the words all persons do not include persons covert. this Stat. was made out of abundant caution. it having been determined by the court in the same way between the enactments of the two Statutes  
Dyer 354. b. 1 Ky. 300. 4 Co. 61. b. Pow. Dev. 148 to 166.  
3 Wils. 2. 2 East 556.

I would here observe that altho I remarked that the gen<sup>l</sup> rule of the wife's disability was not founded in the supposed coercion of the husband. yet this rule as to devising I think is. for no reasoning that applies to the gen<sup>l</sup> rule will apply here. Her own personal privileges will not be violated by a power to devise. for it does not take effect until after death. it is equally certain that the husband's rights to her person cannot be affected. And no one of his rights to his property would be violated. for his interest would not go into effect until after her rights are ascertained



By our statute all persons of full age & right understanding  
and not otherwise legally incapable have power to devise  
their real estate, &c. in other alienations. H. Con. 164.3.  
As to the meaning of the words "otherwise legally incapable"  
the construction of the stat. of 32 Hen. 8. furnishes I think the  
true rule of construction. The words of that stat. "all & every  
person" include only those who could before dispose of real  
estate by other modes, and even always holden not to include  
feme covert any more than idiots or lunatics. Pow. Sec.  
141.

It was decided by the court of Errors in Court-term 1800 or 30  
years since that a feme covert could devise her real  
estate, but that decision has been since overruled and  
I think correctly. Judge Reeve however differs from  
me on this point, and I believe from most of the pro-  
fession. Kirby 195. 438. 2 Day 163. We have however now  
a new stat. expressly authorizing feme covert, having real  
estate to devise it. H. Con. Book 2<sup>d</sup> par. 15.

In general both  
in Eng and in Court a feme covert cannot make a will or  
bequest of her real property, if she could the consequence would  
be to deprive the husband of his right, in addition to the  
argument of presumed coercion. 2 Bl. 498. 4 Co. 51 Cro Ch<sup>3</sup> 376  
Sha 871. 2 East 552. Off. of Ex<sup>r</sup>. Writ. 196.

It has been said in-  
correctly however, that she may bequeath the property she  
holds in right of another as when she is Executrix, this  
is Judge Reeve's opinion but I take it to be incorrect. The  
precise rule is that she may appoint an Ex<sup>r</sup> as her suc-  
cessor & take the goods and this even without her husband.

consent but she cannot devise a beneficial interest in them even with his consent. She has merely an executory power and can only continue the succession. 2 Bl. 498. 2 East. 552. Godol. 301. 110. 111.

In Eq<sup>ty</sup> a feme covert may bequeath personal property holden to her sole and separate use, for she is then considered as to this property as a feme sole. 2 Bl. 498 Ch. m. 1 Fen. 98. 1 Ky. 303. 518. 2 Ky. 190. 1 Bro Cha. 16 3 ib. 8. 3 Alk. 709.

On the other hand she may with his consent bequeath any kind of personal property whether it originally belonged to him or her: but here is no disposing power in the wife. She acts merely as the agent of the husband, who has it in his power to authorize any body to bequeath it. His consent is the disposing act. & the legatee takes thro' the wife as agent. 1 Mod. 211. 2 Bl. 498. 1 Str. Bl. 347. 3 ettk 695. 2 P. m. 82. 316.

But the husband's assent to a devise by the wife of property that may accrue to her after his death will be of no avail, and the bequest is void. it goes upon the ground that the wife has no right herself and the husband has none, nor even could have any. 2 East. 552.

If a feme sole makes a will marries and dies before the husband her will is revoked by the marriage for it is essential that there be a power to revoke in the testator, and her power being suspended by the coverture the law revokes it for us 2 P. m. 634. 4 Co. 60. 2 P. m. 695. 2 Bl. 499.

But suppose



the wife in this case out lives the husband it is not  
well settled whether the will is revoked or not. the opinions  
are contradictory. The question is whether as the marriage  
revoked, the death of the husband revived it. Godol. 29.  
2 V. Rep. 689. Moon 381. Pow. Dec. 173. 2 Bl. 499. Ch. n.  
2 V. Rep. 695. Lumb. it never revives.

and I will make during coverture is not vali-  
dated by the husband's death, for if not good at initiation,  
or at its inception, it cannot be validated, and as it  
was void then at the making, it must be bad forever  
this rule is well settled. Pow. Div. 1733. 3 East. 552. Lalk  
238. Plow 343. 1 Eq. Ca. 171.

But a firm court may ex-  
ecute a bare authority or a naked authority this being  
a mere agency or power of att<sup>n</sup> to dispose of another land  
being a mere instrument she may execute as well as  
another person. her own interest not being at all  
affected. 1 Inst. 112. a. note b. 4 Cr. Dig. 21. 236. 7. Com Dig.  
Bar & Fem. P. 3. 1 B & P 192.

Or suppose a devise of prop-  
erty to a feme covert in trust or in condition that she  
conveys it to another or a part of it. she would be bound  
to execute this power. on the last supposition it would be  
in equity to prevent a forfeiture. it seems.

But if a devise is made to a free court to his own use and that of his heirs and a power to convey it. He cannot dispose of it, for the person giving cannot confer the power to dispose of his inheritance. tho if it had been given to his sole & separate use, he might dispose of it in Eq<sup>y</sup> in discharge

power 1 B & P 192. 1 Foub. 300, 301. 11 Rep. 346

She may however exercise a power or authority retained by herself to convey or even devise her inheritance if settled by way of trust or power over a use, and then are two ways by which she may virtually dispose of her inheritance by will or a writing in the nature of a will. Pow. Dev. 150. 1 Foub. 300.

Thus by way of power over a use, if the estate of a person sole is conveyed to the use of herself for life with remainder to the use of such persons as she shall appoint by deed or will, or writing in the nature of a will, her appointment or limitation will be valid in Ch. and also at law under the stat. of uses. 2 Ry. 75. 191. 610. 2 T. R. 625. 6 Bro. Par. Ca. 156. 1 Den Bl. 346.

Another method by which a person could can virtually devise her inheritance is, when the estate is conveyed to trustees for her sole & separate use during coverture & afterwards in trust to the use of such persons as she shall appoint by deed or will or writing in the nature of one. This writing is a valid appointment or declaration of a trust, and as effectual as if she were a person sole. This is good only in Eq. for courts of law know nothing of trusts, etc. and it seems that a person could can devise her real estate only in this manner. 2 T. R. 625. 2 Ry. 191. Pow. Dev. 149, 150. 1 B & P. 192

The reason why all this apparatus is necessary is, that in this way the feme does not devise in the theory of the law. Thus the estate is conveyed to c & B who hold the l-



get title for her use in Eq<sup>t</sup>. A + B have given her power in their covenant to dispose of the use, and they will execute all necessary instruments to affect her conveyance. So that she does not in the theory of the law dispose of it at all. The courts of Eq<sup>t</sup> compel the trustees to perform their trust. This reasoning is technical & artificial yet it certainly is very obvious.

And if the estate has not been settled yet if articles have been entered into before marriage she will be equally affected in Eq<sup>t</sup>. 6 Bro Par Ca. 156. 2 T Rep 695.

A free court may bequeath her personal property under a loan agreement of the husband made before marriage, that she may reclaim it, for upon the marriage the property is absolutely his and Ch<sup>c</sup> will enforce the ag<sup>t</sup> indeed it can be enforced only there, for by C. L. the wife cannot hold separate property. Pow. Dev. 166. 7. 2 Vy. 191. 2 Bl. 298. notes.

But a power to convey by deed the property of another may be executed by a free court without the intervention of any use or trust, for being the mere agent or instrument, the appointer is considered as taking by virtue of the instrument which gives her the power tho' tho' the person executing it. Pow. on Pover 31. 2. Voy 80. Latet 11. 135. 137. Falk 239.

The effect of agreements between husband & wife made either during coverture or before

It is a good rule of C.L. that all contracts made between husband and wife are void and all contracts made before are dissolved by the marriage. 1 Bl. 442. 1 Inst. 112. 264. Cro. El. 551.

The reason is evident.

As alleged for this rule was that the legal existence of the wife was merged in that of the husband. The true reason seems to be 1<sup>st</sup> That by virtue of their legal union the rights & obligations must in the same person & so unite that the law allows of no remedy <sup>ad</sup> between them. 2<sup>d</sup> A recovery if obtained in one of the cases would be perfectly nugatory by reason of the husband's right to the wife's property it would be for him to recover what was already his own, or what he might make his own by his own act. And if he could recover against himself also imprison him & she could not relieve herself. On the other hand if she should be permitted to recover of him, the property would be his immediately on the recovery. And lastly to notice of the law will not allow of an action between them & this is reason enough why there should be no binding contract between them, for the law knows of no right without a remedy and neither can be said to be bound by a contract which neither can enforce.

As a conse-

quence of this rule of the C.L. If the wife of a Def<sup>t</sup> in an action becomes Ex<sup>or</sup> or admin<sup>r</sup> to the Def<sup>t</sup> in the action, the suit itself is destroyed or discharged for as the only legal title is in Ex<sup>or</sup> to carry on the suit. 8 T. Rep. 407.



If it having obtained judgment ag<sup>t</sup> B. has taken and committed him. & it dies having made B's wife his Co<sup>o</sup>. B must be discharged immediately for his own wife is now the creditor. & he cannot keep him in prison. Besides she being Co<sup>o</sup> the legal right arising from that capacity accrues to him and he can in force all the rights she has to pursue the absconding (if the suit continued) or keep himself in prison being both debtor & creditor. 8 T. Rep. 477.

So this part of C<sup>o</sup> there are several exceptions which I shall mention to you here after & it is those contracts made during coverture by C<sup>o</sup>. no contracts between husband & wife as to personal property are valid for reasons which have been already given. in case C<sup>o</sup>. does not recognize her right to hold separate personal property. 1 Pow. Con. 84. 1 T. Rep. 9. 1 Fin. B's. 336. 345. 6.

And a deed of lands from the husband directly to the wife is void at Law and certainly was in Eq<sup>o</sup>. and this on the acct of the wife being already in him & because of the invalidity of any conveyance without her assent for I think the Law knows of no right which it cannot remove. 1 Inst. 32 note. 12. 1 Pow. Con. 84. 2 Co. 29.

But it is now settled in Eq<sup>o</sup>. that the husband may settle property to the wife and her heirs or of his wife during coverture without the intervention of trustees and that her

agreement was with her husband respecting it may be binding. I say "may be" that is the relation of Bar & Pinn does not prevent in Eq<sup>y</sup>. For Ch<sup>y</sup> can act when the property itself directly without affecting the personal rights of either party which a court of law cannot do. 3 Vy. 669. Pinn. Cha. 144. 2 Vern. 64. 1 Attk 270. 1 Vy. 163. 517. 2 Vy. 191. note. 1 Bro Cha 16. the rule tho of recent date is very familiar  
1 Bro CC. 150

In the Stat of Enon of 3 it was holden that a wife could not hold separate property to her sole & separate use. but it has since been overruled & as I think correctly. 1 Day 221. 235.

And in these cases when the courts of Ch<sup>y</sup> enforce their contracts between husband & wife. she may sue him in her own name by her next friend however & note alone. 1 Attk 278. 1 For. 87. 99. Pinn. Cha. 496. 2 Ch. Rep. 163. 168.

And it has been determined that if a husband to encourage his wife in studying & mind to allow her the avails of or parts of the avails of her labour the agreement is binding & may be enforced in Ch<sup>y</sup> 3 P. W. 337. 1 For 92.  
Con 1 Day 221. 235.

A donation causa mortis given to the wife is good in Eq<sup>y</sup> and I suppose also at law because it is a testamentary disposition & no one ever doubted but that he could bequeath the prop



erty to his wife. It is truly recited in his life time but it is of no avail unless he dies.  
1 Inst. 3a. note 1.

If a husband covenants with his wife not to meddle with her estate he is estopped to do so by the covenants. but she is not left to a suit on that. but she may have an injunction in Eq. 2 Bro Cha. 377  
1 Mer Pl. 334. 341. 351

And articles to live separate are enforced in law and Eq. And if the husband should attempt to violate that agreement. she may be discharged by habeas corpus  
1 Burr 542. 2 Bro Cha 377. 2 East 283. Sta. 478  
3 Bro Cha. 614. 3 Vern 387. 571. 2 Eq. Rep. 10.

The husband is bound however by such a agreement only to the extent of the terms of it. if therefore after a man agrees not to live separate any property accrues to the wife it will be as much his as if there had been no separation. unless the contrary is expressly stipulated in the agreement. for a man agrees of this kind is not necessarily an abandonment of his right to her property. Bacon Bar. & Feme Br. or. 290. 1 Vern 261. —

The other class of contracts are those made before cohabitation or those made by persons who afterwards intermarry. The general rule is that if a man is indebted to a woman or she to him. the marriage extinguishes

the contract or obligation. 1 Bl. 442. Cro. Ch. 551.

The reason of this rule has been explained. If then the husband is indebted by bond before marriage, and then the bond is cancelled, it will not revive for a personal contract once suspended is forever extinguished. 1 Bl. 442 Cro. Ch. 551. 4 Pow. Com. 254. 2 Sm. Bl. 10.

And if an obligor marries one of several co-obligors the whole debt is discharged & extinguished for each being liable to pay the whole & discharged to one discharges the whole. 1 Fan. 99. Cro. Ch. 551. Com. Dig. Part 2. 3. D. 1. & F.

Under the general rule a distinction is taken between a contract that creates a debt in the husband during coverture and one that does not. for a covenant or promise to leave his intended wife a sum of money after his death the promise being made before marriage is good at law or Eq. for here is not that incongruity before noticed. there is no right that cannot be enforced, no claims arising until the relation ceases. Galb 3256 19 Feb. 93.

As to a bond executed before coverture conditioned to leave the wife a sum of money after his death, there has been much contradiction & diversity of opinion. the question is whether it is discharged by the marriage or not. It was said that the bond or promise creating a debt in personam was discharged. but this opinion was 2<sup>d</sup> Hott. but it was overruled. It is now settled by 2<sup>d</sup> Remyon & Kings bench



unanimously, that it was not discharged. Talk 325  
 Cuth. 511. Com. Rep. 67. 5 D. Rep. 381

That such bond  
 was good in Ch. as evidence of an agreement has now  
 been doubted but in those very cases the Chancellor  
 evidently considered the bonds void at law. it has  
 been settled however that they are not so. 2 D. M. 243.  
 2 Vern 480. 2 Attk 97. On Cha. 237. 2 Vent. 343.

That  
 a promise to this effect made before marriage was good  
 at law was determined as early as the time of 2d Atk.  
 act & Croke. Hobart however contended against it  
 but his opinion was overruled the law is now well  
 established. Hob. 216. Cro. J. 571.

The wife by accepting a  
 jointure before marriage may bar her right of dower  
 being an agreement made in contemplation of marriage  
 the subsequent marriage was now considered as extin-  
 guishing it. 1 Inst. 36. 4 Co. 1 & 2. 2 Bl. 137. 8. 1 Bull. 173

The law regulating jointures is prescribed by stat. 27 Hen 8.  
 called the st. of uses. The requisites of a good jointure by that  
 stat are 1<sup>st</sup> That the estate be so limited as to take effect  
 in possession immediately on the death of the husband  
 2<sup>d</sup>. It must be for the life of the wife at least and not  
 the life of another 3<sup>d</sup> It must be given to herself and not  
 to another in trust for her 4<sup>th</sup>. It must be in satisfac-  
 tion of her whole dower. otherwise it will not bar her  
 right of dower. It is said that it must be as proposed  
 to be in bar or satisfaction of dower the latter opinion

however is that it need not be so expressed, it may be amended and proved without. 2 Bl. 138 to 140 & note Ch. 1 Inst. 36. 4 Co. 3a. Owen 33.

The phraseology of our state is such that it has been doubted whether a good jointure might not be made of personal property. For Eng. it must be of freehold. In our stat. after the word freehold comes or "some other estate" my opinion is that those words meant to include an estate higher than a freehold, and has been determined in the case of *Ellick & Delects*, that a jointure must be of a freehold under this statute.

But altho it must be of a freehold and have the requisites above specified, yet an executory agreement before marriage to a wife of personal property or money will in Eng. bar her dower. The reason why such agreements are not good at law, is that courts of law have no discretionary power, they have only to enquire whether personal estate will constitute a jointure to bar dower. But Ch. can take care that the wife does not suffer injury, so that she is perfectly safe 1 Wig. 55. 1 Cow. Con 53. 1 Inst. 36. b.

If a jointure is settled after marriage, the wife on her husband's death may accept it or refuse it and take dower, for being made during coverture it does not bind her. She cannot however take both. 2 Bl. 138. 1 Buls. 197. Dyce 368.

And in this case by bringing a writ of dower she waives the jointure *ipso facto*. 3 Co. 27. a. 4 ib. 5. b.

And if a wife



agrees to accept a gift by way of dower in stead of dower she may after determination of coverture except a refusal the dower for being made during coverture does not bind and if made before she would not in genl. be bound. And in these cases the genl. rule is that she may take both unless the devise is expressed to be in bar of dower. and the reason is that no parcel proof could be admitted to prove that it was so intended. for that would be directly in the teeth of the stat. of frauds. It was decided that it might be admitted. but that decision was reversed and the reversal affirmed in the house of Lords. 4 Co. 4. 5. Cro Eliz 128. Pow. Div. 480. 1 Inst. 364. 2d Ray 438. 483. 1 Eq. Ca. 219. 2 Vin 366.

But tho the de-

Joinder not perfected  
by abettery - an  
inf-firm bound  
by marriage settle.  
2 Pl. 138 n.

viser is not expressed to be in bar of dower. yet she cannot take both if the husband has devised away all his other property. this affording proof that he intended the devise to be in satisfaction of dower. To suppose otherwise would be to suppose that he intended only parts of his will to go into effect. 2d Ray 438. Cro Eliz 128.

And in relation to these agreements it is now a genl. rule that a marriage settlement as it is called is binding in Eq. upon both parties. being provisions made for the family in contemplation of marriage. 1 Pow. Con. 444. 2 ib. 255. 2 Vin 480. 493. 2 Attk. 97. 1 Fon. 87. 93 to 95.

Of Husband's rights and power over the person of his wife.

If the wife is injured in her person by the wrong

ful act of another and the husband sustains consequential damage, as by battery, slander, false imprisonment &c. he may sustain an action in his own name alone which is indeed the only way for the special damage. Laying it with a per quod consortium amittit. Affirm however the action is brought for the personal injury or for the battery. Both must join. 1 G. 2. 346. Co. J. 511. Cro. El. 22. Fulk 206. 1 Ch. 140. Com. Dig. Bar & Dem. W.

So also the husband is entitled to an action against any one for criminal conversation with his wife. In this case there must be proof of an actual marriage and that it was lawful. a marriage de facto will not support the action. 4 Burr. 2057. Bull. N. P. 27. 8. Doug. 162. Esp. Dig. 342. Peake Ev. 330.

But if the husband consents to the act he cannot maintain this action. for he cannot convert his wife into a commodity and then sue others for using her. 6 T. 51. 1 Selw. 13. 14. 15

It has been once determined that if he himself lives in open incontinency he cannot recover, but it has been lately decided to go only in mitigation of damages. 4 Esp. Rep. 16 1 Selw. 15 note. Phil. 139. 4 Esp. 237.

It has been said too that this action cannot be maintained after separation by mutual agreement. but this has since been doubted. 5 T. Rep. 357. 2 East. 244

If a married woman is allowed by her husband to



live in a house of ill fame. he cannot maintain  
this action. Bull et P. 37. Peates Rep. 3. Selw. 5.

But if she was in this state without his knowl-  
edge the fact would go only in mitigation of dam-  
ages - if he knew of it or consent however destroy  
the right of action. it is an e.

Husbands neglect or  
inattention to the conduct of his wife goes only  
in mitigation of damages. it does not bar the  
action because it does not amount to consent on  
his part. 4 T. Rep. 651.

In aggravation of damages.  
Plff may prove the rank of his wife. Her previous good char-  
acter and the domestic harmony with which he lived  
with her before. also any thing which will show the  
turpitude of Def<sup>t</sup>.s conduct as breach of trust & hosti-  
lity, and his weakness. Bull et. P. 37. Esp. Dig. 343  
1 Salk. 300.

In mitigation of damages. Def<sup>t</sup>. may  
prove. Plff ill treatment of his wife or his severity  
towards her at home, that he turned her away, refused  
to maintain her &c. the wife's previous bad charac-  
ter winced by misconduct or elopement, indecent  
manners, or even incontinency before marriage. 4 T.  
Rep. 657. 2 Esp. Rep 562. 2 ib. 16. 1 Selw. 30 & 31. Bull P. 274  
Phil. 140.

But Def<sup>t</sup>.  
cannot give in evidence, any misconduct of Mrs after  
the act complained of. for the seduction. Def<sup>t</sup>.s own  
act might have been the cause of it. 2 Esp. Rep 562

in. 31.

According to the old C.L. the husband might give his wife moderate correction as he was liable for her misconduct, but if he beat her violently or threatened her, he could not justify it. & he might bind her to his peace <sup>by a writ in Ch.</sup> or obtain a divorce, <sup>propter sevitiam.</sup> 1 Sid. 113. 1 Hawk. 130. 1 Bl. 471. 8 Mod 22. 1 Bac. 385. - More. 874.

It seems to be the better opinion that he cannot use personal violence with her by way of castigation or chastisement, any more than he can with a stranger, & if he does, she may bind him to his place and he has the same relief against her, and we have cases of both kinds. 1 Sid. 113. 2 Lev. 128. 1 Bul. 445. 3 Keb. 433.

He may however impose restraints upon her liberty in case of gross misbehaviour or to prevent her doing mischief and may use all necessary violence for this purpose but not other. Stra. 478. Cor. Dig. Bar. & Feme. C.

But if he confines her without good reason or with unreasonable strictness a security. she may be discharged by habeas corpus. 1 Burr. 634. Sta. 478.

He may justify a battery in defence of his wife as she may in his defence. i.e. each can justify precisely as in self defence. 2<sup>d</sup> Ray. 62. Cro. J.<sup>n</sup> 239. Bull. et N. P. 18. Esp. Dig. 314. 318



of the mutual inability of the husband & wife to testify for or against each other.

In *Crim. Con.* neither wife alleges to testify her confessions are used against her husband's reputation with him are. Phil. 64.

If one brings an action upon sole her husband cannot testify to the marriage. Phil. 64. *Rea. 173-5*

The genl. rule is that they cannot testify either for or against each other. This union of interest and the policy of the law seem to be the foundation of the rule. 1 Inst. 6. b. 1 Bl. 443. Bull. N. P. 286. 4 T. Rep. 768. 6 T. Rep. 173-5.

And the husband cannot testify when the wife is concerned with against his own interest. Thus when an estate was settled to the sole & separate use of the wife, & that property was taken in Eq<sup>y</sup> for the debt of the husband and the trustee bore an action against the Chf. He could not be admitted to testify that it was the wife's sole & separate property. 4 T. Rep. 768. Eq. Dig. 720. Phil. 64.

Neither the husband or wife is admitted to give evidence in any case even between strangers, which tends to criminate the other. Thus in settlements cases, a marriage being in question the former wife was not admitted to prove the husband was formerly married to her as it would be accusing him of bigamy, even altho he was no party to the suit. Peake Ec. 174. 5. 1 McCallby. 161. 2. 2 T. Rep. 263. Ray. 1. 2d Ray, 752. 1. Val. 670. Eq. 740.

And a woman divorced a vinculo matrimonii cannot be a witness against her former husband to prove any fact that happened before the divorce or during coverture rather because it might tend to impair the confidence during coverture by a jealousy that one would betray the other. Peake Ec. 174. 2d Ray 752.

But altho such

divorce she is a competent witness to prove facts that took place after the divorce for the above reasons do not apply. *ib. an. c.*

It is a general rule of evidence that a person may testify against himself & by consent of the opposite party for himself. But it is not so when the relation of husband & wife intervenes. for if the ~~officer~~ court should consent that the wife might testify, the court would not admit it. for the evidence might be against him on the cross examination. and this the policy of the law will not allow. *Peters Ev. 175. Ray. 102. 1 Inst. 6. b. Hard. temp. Ca. 264.*

But to the general rule there are some exceptions. 1<sup>st</sup> It has been said and considered as a rule, that when the husband is indicted of treason the wife may testify against him. because it is ~~in~~ that the duty of allegiance is paramount to all private obligations. *Ray. 1. 1 Hale. P. C. 48. Bull. N. P. 286. 2 T. R. 433.* This has been doubted and the rule is not settled. *1 Hale. 301. 2 Hawk. 608. Phil. 689.*

2<sup>d</sup> When she exhibits a complaint to bind him to his peace or good behavior. she may be a witness ag<sup>t</sup> him and ~~vice versa~~ converso. this evidence is allowed from necessity. *2 Hawk. 432. Bull. N. P. 287. 1 Burr 542. 1 Bl. 443. E. R. 633. Ray. 1. Peters Ev. 173 Phil. 68.*

So when the husband is prosecuted by the public for personal abuse offered to the wife. she is said to be a competent witness. this has been denied. but it seems to be a true rule. for if there is a case in which the



timony is to be admitted from incapacity this appears to be one. The rule holds equally & converso. Hut. 115. 1 McMilly 145. 172. Sta. 633. Ball. et P. 287. 2 Hawk. 308. Peates Co. 173. 1 Bl. 443. Ch. notes (contra Ray. 1. 1 McMilly. 161.) Phil. 68. 1 East P.C. 154

This is also a witness  
to prove the illegit.  
voluntary. 63/720.

again when a woman is forcibly carried away and married, she is a competent witness against her husband all facts, to prove the fact, since the stat 3 Ann 7. has made such crime a felony. This is indeed no exception to the rule for the marriage having been forcible it is void by C.L. since consent is indispensable. By the stat it is strictly void. Cro Ch. 488. Ball. et P. 286. 2 Hawk. 608. Peates Co. 174. 1 Bl. 443. 470. Pl. 67. 8.

Further if a man marries having a former wife living, the second wife may testify against him and for the same reason, the second marriage being void, and even on an indictment for bigamy she may testify to her own marriage after the first marriage is proved by strangers. Ball. et P. 287. Esp. Dig. 721. 4 Bl. 163. Peates Co. 174.

And in an action between other parties the wife has been admitted to give such evidence as would indirectly charge her husband with adultery but not criminality. As in an action against the bridegroom for breach of wedding clothes, the bride's mother was admitted to prove the clothes to have been procured on the credit of her husband. 18th 534. Ball. et P. 287. Esp. Dig. 721

But where her evidence in our action between stran-  
gers would tend directly or indirectly to crim-  
inate her husband she cannot testify. 1 McCall.  
161. 2. 1 Hal. P.C. 301. 2 T. Rep. 268. 1 Bl. 443. note.

nor can she testify where her evidence would spe-  
cially in directly be binding on one of the parties.  
as in our act<sup>n</sup> for a conspiracy. he being one she  
cannot testify in favour of others. for what tends  
to disprove the conspiracy is in his favour. The 1095.  
5 Esp. 107. 1 McCall. 162. 3. Phil. 65. 6

If however there is no  
evidence at all given against her husband I should sup-  
pose that she might be a competent witness. and this seems  
implied in The 1095. 1 McCall. 162. 3.

And it has been  
determined that the declaration of the wife as to transac-  
tions immediately within her province, may be proved  
by third persons against her husband. as where the hus-  
band was sued by the wife. the declaration of the  
wife was proved to show that she had stipulated  
with her for so much. The 527 Bull. A. 1887.

Exp. Dig. 721. This case is somewhat anomalous, and  
goes beyond the rules as to a common agent. by thus the de-  
claration of an agent made at the time may be proved  
being considered as part of the negotia. but not such  
declaration as he should make afterwards. Phil. 71. 69.



We are now to enquire When the husband survives must join in a suit and when the husband must sue alone. & when he may join the wife or not at his election. for there are cases of each of these kinds -

A very clear principle will govern all the cases. but all the decisions on this point cannot be reconciled for in some of them the obvious principle has been neglected.

It is a general rule that when the right of action would survive to the wife on her husband's death, she must be joined with him as Plaintiff in the action. 1 Roll 347. 1 Wils. 224. 3 T. Rep. 631. 1 Bac. 304.

The reason why the wife must join is because the husband by commencing the action alone would attach a sole right of recovery in himself & thus oust the wife of her legal right as the case may be. - And she cannot sue alone not only because of his right to the avails of the recovery, but she cannot of herself make an attorney - Besides if she should sue alone she might in case judgment went against her be imprisoned which would infringe the rights of the husband. 1 For. 309

In pursuance of this principle if a real action is brought to recover the wife's land she must join in the action because the right would survive to her. 1 Buls. 21. 1 Roll 347. 1 Bac. 304.

So in respect to

rejoin the wife, land. the not strictly a real action.  
 both must join & for the same reason. 2 Wils. 233.  
 Cro. Eliz. 537. 3 Tith. 631. 2 Attk. 208. 2 Ky. 576. 1 Roll  
 327. Contra Cro. Eliz. 133 when it is said he may sue alone  
 or join at his election. 3 Lev. 233. 1 Km. 335. I join in  
 10 Wils. 578. it seems to be doubted. the I join woman  
 for doubt. Esp. 2404. - See 1 Chet. R. 303.

in  
 measure. & that  
 servants following  
 apply to the question  
 whether husband must  
 join the wife to recover  
 as a chose of wife  
 dum solus.

The rule is the same in an act. for unit due  
 to the wife while sole & for the same reason. 1 Roll  
 318. 347. 8. Cro. Eliz. 700. 1 Inst. 55. t. Com. Dig. Bar & Ten  
 4. - <sup>Reverend 131/2 cony</sup> The rule is the same in an action bro. upon a  
 promise by husband made to the wife while sole & for the  
 same reason. 1 Sid. 25 Com. Dig. ibid.

See since the st  
 vesting the rent  
 absolutely in husband  
 Rev. Rel 131.

So also in actions  
 done to the wife during coverture, as battery, slander,  
 false imprisonment &c. These claims being such  
 that the husband cannot make them his own or he can  
 a chose in action. afford the strongest necessity for  
 joining. 2 Ray. 1208. 1 Vent. 328. Cro. H. 551. 538. 539.  
 Esp. Dig. 316. 1 Selw. at R. 314 to 316.

In an action for tres-  
 pass committed on the wife's land both must join. all  
 these cases depend upon the same principle. Com. Dig.  
 Bar. & Ten. V. 1 Selw. 301.

And I take the rule to be settled  
 that in an act. of trespass for cutting the wife's trees  
 during coverture she must join. & the contrary  
 is said by Pollock in 10 Mod. & cited by Comyn with  
 apparent approbation. for it is an injury to the  
 estate. 1 Roll 327. 8. More 432. 2 Wils. 224 Cro.



Eliz. 96. contra. 1 Vent. 195. Com. Dig. Bar & Fenn. 2.

In an action for destroying common unbleached, that is such crops as are raised by summer labour the husband may doubtless sue alone because the right of action would not survive to the wife and if he should die the unbleached would go to his representatives. It seems to me that it cannot be set his action whether to sue alone or join the wife, for altho there are such cases yet they depend upon entirely different principles from this. Co. Eliz. 133. 2 Vent. 195. Com. Dig. Bar & Fenn. 2.

So also in trespass for destroying or impairing the grass growing upon the wife's inheritance during coverture. There is no doubt but he may join the wife. I think he must for the action would survive, grass being of the nature as much as trees. Bacab. 277. Com. Dig. Bar and Fenn. 1. Co. Eliz. 96. 2 Wils. 224.

In trover for the wife's property if the conversion was before marriage, the wife must join because her right at the time of marriage was a chose in action 3 T. Rep. 631. If the conversion was after the marriage I state it that the husband must sue alone, because until the goods were converted after the betrothal the wife has a constructive possession, neither was there cause of action till then. see next question. Sal. 114. 1 Bac. 289 1 Vent. 261. 2 Geo. 107. 1 Wils. 102. 3 W. Rep. 631. given

So also for injuries done to the person or property of the wife which sole both must join. as to this there is no doubt. as in *Trespap. battery* 35 Rep 627. 1 Roll 347. 1 Bac. 306. Moore 422.

But there are some cases in which the husband may sue alone or join the wife at his election. Thus attle if the husband sue for rents due to wife while sole he must join her (and) yet if he distrains goods for this rent and the goods are rescued he may sue alone or join the wife for he may either consider the tort as done to himself as he had the goods in his possession. or he may consider the proceeding throughout as to that them as the means of enforcing the wife's right of action. *Cre Ely* 459 Moore 584. 422. Com' Dig. (Bar. & Fem. l.

An debt in covenant for rent accruing out of wife's land during coverture he may sue alone or join the wife. for as the claim accrues during coverture the husband may either assent to his interest in it and join her or dissent & sue alone. *Palmer* 207. Com' Dig. Bar. & F. R. 4 Co. 51. 2 sub. 692. (Doubt must join for it is said)

If a bond is given to the husband & wife during coverture he may either sue alone or join the wife for the same reason. *4th*. 230. 4 T. Rep. 616. 2 Vry. 676. 7. 1 East 432. 3 B. & 267.

Although however the bond given thus during coverture & he does not actually assent or dissent to the wife,



intend in it, and as having it in collectio.  
could he maintain an act<sup>n</sup> upon it? West Rep.

1 L. R. 309. 10

I observed to you that if a bond is given to husband and wife during coverture, the husband may sue alone or join the wife. The rule is the same, if a bond is given to husband and wife as Executors to another through the bond wrote doubtless survivor, the reason of the rule is that having the legal title he may treat it as his own for the purposes of collection subject to account for the surplus as agents of testator. 4 L. R. 616. ibane.

And when the bond is thus given if the husband sue alone, he may declare upon it as a bond or obligation to himself alone and it will be no variance, because it is in legal effect his only if he chooses to make it so. ibane. 1 L. R. 309. whether given as Ex<sup>rs</sup> or otherwise.

And if a bond or other personal obligation is given to wife alone during coverture he may sue alone or join his wife in an action on it at his election. The reason is that this bond is considered as the gift of any specific article to the wife would be, and he may treat it as his own if he pleases without any reference to the interest of the wife. 3 L. R. 403. 1 L. R. 396. 2 V. 576. 1 East 232 3 E. 266

If a legacy is given to the wife during coverture, the husband may either join the wife or sue alone as before and for the same reason 1 R. 31 108. 1 Mod. 179. 2 Roll. 134.

3 Bl. 366. 1 East 432. 4. 5 T. Rep. 642. 1 Cuth. 458. 9.

You will find a diversity as to the question whether the legacy would survive to the wife the better opinion seems to be that it vests in the husband and will not survive to the wife unless the husband spends to the wife's interest.

When the wife is the malicious cause of the action and an express promise is made to her the husband may either join the wife or sue alone altho the cause of action would not survive to her thus for services rendered by herself. there being an express promise the wages belong to him, yet he recognises his right by joining her in the action as he has a right to do. But if the promise is implied the law presumes it to be in his favour only. Cro. J. 77. 205. Cuth. 251. 2 B. 128. Cro. Ely. 61. Salk 114. 2 Wils. 424.

There is a contradiction as to whether the action would survive to the wife. the better opinion is that it would not, but the husband may affirm the promise as made to her. ib. anc. 2 Bl. Rep. 1239. It is in that case said that the wife cannot join without a statement of the wife's rights & interest. 2 Bl. Rep. 1236. 2 A. R. 405. B. N. 53. Haud. 350. 353. Day. 312.

When must the husband sue alone... When the wife is merely the suffering cause of action and the husband sues for damages merely consequential he must sue alone, the action not being for the personal action per se. 1 Geo. 140. 1 Sid. 346. Salk 206. Cro. Ch. 89. Cro. J. 501. 538. 1 Keb. 491. 2 Keb. 287.



and in this case the action must be laid with a per-  
quod consortium amittit which is the gist of the  
action. It is called trespass in the Eng. but I should  
think it more properly case. the Eng. decisions  
are founded on precedent which seem to me incor-  
rect & contrary to principle. 2 T. Rep. 167. 2 Bro &  
Pul. 476. 6 East. 387. Esp. Dig 645. 1 Ed. 9. 11. 13.

If a battery is committed upon husband & wife  
at one & the same time, they cannot join for the  
injury to the husband, but for the injury done to  
the wife they must join. The injury done to the hus-  
band is considered as done to him alone & so it  
is with the injury to the wife ~~except~~ as to the con-  
sequential damages. but she cannot sue alone  
Cro. 11. 501. 538. 355. Yelv. 89. Cro. Ch. 98.

But if they  
should join for the injury to both and separate  
damages given, the husband might release his  
own damages, and take judgment for the damages  
on the injury to the wife, for they had a right to  
join to recover there 1 Vent 328. 2 ib. 29. Cro. Ch. 655.  
Hend. 166. Sel. 303. 2. 5.

and if in the case last stated, the husband  
was guilty as to the battery of the husband but guilty  
as to the other, the Jff may take judgment the verdict  
will stand. Cro. Ch. 655. 2 ib. 29. Hend. 166.

If a prom-  
ise is made to the husband in consideration of delaying  
to collect a debt due to the wife when sole he must

see alone and cannot join the wife. for the promise was made to him and the right created by it is exclusively his. Besides, there would be a variance if he joined the wife, the promise being made to himself. Cro. J. 110. Talk 117. Carth. 462.

So also an act for seducing the wife must be hot by him alone the injury being done to him alone. 4 Ben 2057. Bull. et P 27. Doug. 162. Esp. Dig. 342. 1 Selw. 9.

I have observed that when an action is hot in a personal injury to the wife she must be joined. But a dec<sup>n</sup> in trespass by the husband alone for beating & entering off his house & beating his wife, <sup>with her goods</sup> is good. for the beating is the gravamen and the beating is merely aggravation as in case of beating servants. Stra. 61. Esp. Dig. 407. Sel. N. P. 305<sup>n</sup>.

A dec<sup>n</sup> by husband & wife. for imprisoning or beating the wife. per quod the husband suffered special damage. as that his business remained undone and led to this joint damage is good after verdict. The wife cannot join in a per quod. but after verdict it is regarded as a matter of aggravation. This seems opposed to the sound principles of pleading as the per quod appears to be the cause of action. but the courts consider it <sup>per quod</sup> after verdict. Talk 119. 6 Mod. 127. 1 Bac. 306. 7. Sel. N. P. 305<sup>n</sup>.

It is a great rule that if husband sees alone when he ought to join the wife or joins when he ought to see alone; the mistake is in-



enable and not aided even by verdict. 2 B. Rep. 1226  
1 Vent. 328. Sta. 61. 229. Cro. Gly. 133. 3 East 104. Le. 3478.

But if the wife  
sues alone which the law does not allow. Def<sup>t</sup>. can  
plead coverture only by way of abatement, or perhaps  
as to the disability, as the plea does not go to the  
merits, and if judg<sup>t</sup>. goes against her, the husband  
& wife may remove it by a writ of error. 3 B. Rep. 627.  
1 Bac. 307.

If husband & wife join in a dec<sup>r</sup>. which  
shows no interest of the wife, it is ill certainly on  
special demurrer & I think on gen<sup>l</sup>. demurrer. They  
suppose husband & wife sue for settling trust on such  
a tot without stating the wife's interest. - The rule is  
that the wife should not join unless the land were  
hers and if it were it should be so stated, and it  
has been said to be ill after verdict. But according to  
authorities I think it could by verdict. 2 N. Rep. 405  
207. 8. Cro. J. 644. Bull. N. P. 53. 1 Selw. 311-12.

It may be cured because the wife may have an  
interest and the court will not presume that she has  
not after verdict.

When must husband & wife be joined as Def<sup>t</sup>. when  
not.

And the first gen<sup>l</sup>. rule is the counter part of the  
one which regulates their joinder as <sup>co</sup> Def<sup>s</sup>. If the  
cause of action would survive against the wife  
she must be joined otherwise the husband's representa-  
tion might be injured. As in an action for debt due from

the whole sole. the husband being only liable during  
coverture for such debt. 1 Bl. 443. 1 Inst. 351. 1 Keb. 281.  
440. 7 T. Rep. 348. 3 Mod. 186.

If an action real is brought  
to recover the lands held in by husband and wife as hers,  
she must be joined as Solt. Com. Dig. Bar. & Fines. -

So also in  
actions real for torts committed by wife before coverture & she  
must be joined and for the same reason. 1 Inst. 133. 351. 6. Com.  
Dig. ibid. - But the same when action is brought to recover  
rent due before coverture from her, and so in general in  
all actions in which the wife was liable while sole. ib.  
anc. 1 Bac. 367.

Same rule holds of all actions for torts  
committed by her alone & without husband's privity  
during coverture, for you will remember that these  
survive against her. Cro. Ch. 301. 1 Wils. 147. Sta. 1237.  
1 Roll. 6. 1 S. Cas. 312.

If a lease is made to husband &  
wife an act. for rent accruing during coverture  
must be brought against both, for you will recollect that the  
wife's purchases are only voidable. It cannot void this  
lease during coverture and it is good until voided  
both for her and against her. 1 Roll. 348. 1 Bac. 307  
Com. Dig. Bar. & Fines.

But on the other hand when the  
cause of action would not survive against the wife the  
action must be brought against the husband alone  
Thus if a feme sole leases premises and rent accrues  
during coverture the action must be brought against him



It is but this is  
no reason why the  
same rule should  
not govern him  
as in relation  
to suit on a lease  
made during coverture.

alone, but in an action for the rent that accrued before she  
must be joined? that accruing after would not survive  
against her for she could not pay it, and he is supposed to  
have all the advantage of it and it would survive against  
him. Ray 6. Com Dig. Bar & Fen Y.

If a promise is made by  
a husband and wife jointly the husband alone must be  
sued, the wife cannot be joined, for as to the wife the promise  
is void. This case you see is different from that of  
the lease of which I have spoken, the lease being  
entirely voidable as it is supposed to be for the advantage.  
Palmer 313.

If a battery or other tort has been committed  
by them jointly he must be sued alone, the wife cannot  
be joined. The rule is the same if it were committed  
by her alone this is coercion, as in his presence  
or by his command, for in these cases it is considered  
as the sole act of the husband the wife being excu-  
sed according to a former rule. Cro. Ch. 184. or 355. 25<sup>2</sup>  
or 401. Com Dig. Bar & Fen Y. Pleader 2 c 2.

Another  
is the genl. rule as to torts committed by both together jointly  
by or <sup>by alone</sup> husband & coercion during coverture it acc.  
1 Roll. 348. Yelv. 165.

If the wife is joined as deft. where  
she ought not to be or omitted where she ought to be joined  
the writ may be abated, and if it is not pleaded in abat.  
it is error and will support a motion in arrest after  
verdict or a writ of error. As for an ac<sup>t</sup> of hus-  
band & wife for words alleged to have been spoken by the

Husband alone. So if an action were brought against him alone for a debt due from the wife while sole,  
Cro. J. 213. Vent. 93. Yelw. 116:7. 10th Ed. 348. 1 Edw. 318

If a fine count being sued alone, hush coverture and hush she may have Ex. for costs in her own name for not having brought his act against her alone cannot object to such Ex. Or by a scire facias may have one in the names of herself and husband. Long. 64

The wife when sued with the husband cannot plead alone. Husband must join her. She cannot plead in her own persona because of her disability. She by estoppel for by reason of her disability she cannot make one the husband must appoint one for both. When the wife is sued alone, she must plead alone or she cannot plead at all. Cro. J. 231. Esp. Dig. 318.

The relative rights and duties of husband having been considered. We are now to enquire with regard to the celebration and annulling of marriages. and for this purpose we are to consider first what are void marriages. what void and what voidable only.

Marriage is a contract purely civil. and the manner of solemnization are prescribed by stat in Eng & Con. Stat. 1st Mar. previous publication being generally required to be made in some religious assembly or some public place. 1 Bl. 439. 440

When either of the parties is



a minor our stat requires the consent of the parent or guardian as well as publication

The persons authorized by our law to marry others are Gov<sup>r</sup>. & Gov<sup>r</sup> Judges of Sup<sup>r</sup> & C<sup>t</sup> App<sup>t</sup> who have been throughout the state and Circuit Judges whose settlements and justice of the peace within their respective counties. 189. H. Con 478.

If a clergyman or other qualified person marries a pair without publication or consent, the marriage is valid but the officer incurs a penalty. H. Con. 478

It has

been a matter of some speculation whether a marriage by an individual or the parties themselves would be valid. J. Rive thinks it would, but as it is a contract purely civil, and governed by the municipal law, I should think it would not be valid unless celebrated according to that law, and this seems to be the prevailing opinion. Bac. abg<sup>t</sup>. Bar. & Hum. ch. 136. 438 note. 3 439. Salk 438. 120

Marriages not valid are either void or voidable and to determine which we must recur to the impediments. There are of two kinds. Canonical and civil - The first are derived from the divine from the divine law, and arise from the consanguinity, affinity or incapacity of the parties (precontract not now being considered as one.) These are established by Stat. 32 Hen. 8. & 3 Ed. 6. 26 Geo. 3. 1 Bl. 434. 5.

These being derived from the divine

law are in Eng. recognised only in the spiritual courts. 1 Bl. 434.5. They are principally sanctioned by 32 Hen. 8. which declares that nothing God laws excepted shall make void a marriage without the spiritual degrees. Bac. Abg. 5. B & F. ed.

The spiritual degrees are the standard as to consanguinity & affinity — I will here observe that the canonical impediments under the marriage only voidable & that during the lives of the parties only. and no question can be raised after the death of either party as to the legitimacy of the issue, or the legality of the marriage on the ground of canonical impediments. for the object proposed by such inquiries is discipline pro salute animarum nuncq. 1 Inst. 33. 1 Bl. 434 441. Salk 548.

As to the question who are those prohibited by law to intermarry I would first mention all those who are legally related by consanguinity or affinity: a man may not marry his daughter or his son's widow &c. 1 Bl. 435. text & Ch. notes. 3 Bac. 571. Vaugh 242.

Among collaterals, all related in the third degree are forbidden to marry as uncle and niece, aunt & nephew, such being the most distantly related who are forbidden, all those in the 4<sup>th</sup> degree <sup>of civil computation</sup> may marry as first cousins who are the nearest not forbidden &c. 1 Inst. 228. 1 Inst. 235. Hob. 181.

This has been much controversy before the



legislature, the courts and the churches. whether a man might lawfully marry his deceased brother's widow. the affinity in this case is of the second degree such marriages are not uncommon, and they are made lawful by stat in Con. Book 2. 478.

But altho the parties were within the prohibited degrees, by the Eng rule, if no divorce takes place during the lives of the parties, the issue is legitimate, as before observed no inquiry can be made after the death of one of the parties. Salk 121. 548. Carter 271. 1 Roll 360.

In Con. on the contrary a marriage within the prohibited degrees is declared by stat null & void and the issue illegitimate, and the parties are ignominiously punished as for incest. St. Con. 479. In Eng. however it is no civil or temporal offence, incest being there a spiritual offence only. 1 Bl. 435. 4 Bl. 645. Salk 548.

The other class of disabilities is called civil and are 1<sup>st</sup> a prior existing marriage between one of the parties and another. 2<sup>d</sup> Want of age. 3<sup>rd</sup> Want of consent of parent or guardian. 4<sup>th</sup> Want of reason. These disabilities in Eng. render the marriage void ab initio so that no divorce is necessary to set it aside. This does not run precisely true as to the disability of age, which may be ratified and this could not be if the marriage were absolutely void. On the most intent, such marriage is void. 1 Bl. 435. 6.

In case of a prior existing marriage, the marriage is not only void, but it amounts to bigamy which by St. 1 J. 1. is made felony. 4 Bl. 164. H. Con. 480.

When then

we want of a gr. the parties after coming of age may ratify the contract without a subsequent solemnization and either party may revoke it, without divorce. The age of consent is by C. L. & our stat. 14 in males and 12 in females. 1 Inst. 70. 1 Bl. 436.

And if either party is under age, <sup>of consent</sup> either party may dissent to it before it is ratified for to be binding it must be mutually so. i. e. cons. In contracts between a minor & adult the rule is that the adult is bound the minor not but it is different in relation to the marriage contract. Still however on a contract to marry in future, the one of full age <sup>might</sup> be made liable tho the other could not. 1 Bl. 436. Ch. notes.

In contracts genl. all that is required is that it is in fact the words be such that both must be actually bound.

Want of

consent is not an impediment at C. L. that is made one by stat. (i. e. of parent or guardian) and probably is so in every state as it is in Eng. 1 Bl. 437. 8.

Want of

reason. the wife of an idiot or lunatick is void for such persons can make no valid contracts whatever. 1 Roll 357. 1 Bl. 438. - Our law is different from the Eng. in many respects with regard to the effect of these impediments. By our law a marriage within the levitical degrees is absolutely void not so in Eng. H. Con. 279. and as to want of con-



out, that does not make void the marriage  
the marriage is valid but the one solemnizing  
it is subjected. In Eng. it is void unless bars  
were published. 1 Bl. 437. 8.

The impediment of person-  
trust was never known in this country. — There has  
been some speculation whether a marriage between  
persons belonging in this state, who to avoid our laws  
fly to another and get married, is here valid  
our laws not being complied with. I take the true  
rule to be that it is here valid the contract having  
been executed. — If however two persons were to go into  
another state where there were no laws against us-  
ing to make an usurious contract & make our law  
our courts would not enforce it. 2 Bur. 1080.  
Bull N.P. 114. 2 Hen Bl. 147. 412. 1 Inst 79. 80 notes

Divorces.

The mode of annulling marriages is by divorce  
Divorces are of two kinds, first is a vinculo  
matrimonii, which is total and is a complete dis-  
solution of the marriage contract. The second is  
called a divorce a mensa et thoro, or that partial  
divorce, a separation of the parties merely while the  
the relation of husband & wife continues. 1 Bl. 440

In Eng. the first kind is to be obtained for canonical  
impediments only and those existing before mar-  
riage & not for a supervenient disability. this rule  
of course excepts the legislature who may divorce for  
any cause. 1 Bl. 440. 1 Bl. 434.

When a total divorce is granted the issue is illegitimate for the divorce annuls the marriage ab initio by relation to its inception. 1 Inst. 235. 1 Roll 358. 360.

The causes of partial divorce in Eng are incontinency, cruelty, and well grounded fear excited by threats. Of late years however it has become common for Parliament to grant total divorces for these causes and especially for the first. Mon 683. 1 Bl. 441.

In partial divorces the wife is generally entitled to alimony to be fixed at the discretion of the Ecc. court. And if it is not paid she may maintain an act. at C. G. to recover it. But if she elopes and is incontinent she forfeits her right to the alimony. 1 Inst. 6. 1 Bl. 441. 2.

Issue born after a partial divorce are presumed to be illegitimate for the decree forbids the parties to live together and they are presumed to obey it this presumption however may be rebutted. Salk 123. 4 T. Rep 356. 7 Co. 42 1 Bac 311. 1 Bl. 457.

But issue born after a voluntary separation by agt. are presumed to be legitimate until the contrary appears for the husband & wife are not required by law to live separate. Sta. p. 25. Esp. Dig. 484. 5. Salk 123.

The difference then is that ~~in the former case~~ the presumption in the former case is against, in the latter in favour of the issue. but it is rebuttable in both cases.



In Can. the sup<sup>r</sup>. Court may by stat. grant divorces for the following causes. 1<sup>st</sup> Fraudulent contract meaning probably to include inbreedity, which is unknown to C.L. or civil law. 2<sup>d</sup> Adultery. 3<sup>d</sup> Three years wilful desertion and total neglect of duty & it has been determined that driving the wife away was equivalent to desertion by the husband. 4<sup>th</sup> Seven years absence of husband or early by reports of the death of the party. & 5<sup>th</sup> Three years absence on a voyage usually performed in three months, on supposition of death. H. Can. 236 & 80.

In the two last cases the absent party is presumed to be dead, and the decree declares the fact and that the party applying is single. There is a similar presumption allowed in Eng. on trials for bigamy under 1 J. 1. when if the party had been seven years absent and if the other could not be convicted, and the same presumption holds in case of loss for life or lives. 6 East. 85. & Bl. 164.

All divorces granted by the Sup<sup>r</sup>. Ct. are total. the legislation can grant either & a question has arisen whether the party against whom a total divorce is obtained may marry again custom has decided this in the affirmative. 1 Sw. 193. In Can<sup>t</sup>. total divorces do not affect the legitimacy of the issue, because granted for supervenient causes. the case of fraudulent contract is diff<sup>r</sup>. but that presumes no issue.

In Eng. in case of a total divorce. the wife has no dower. nor any other allowance. because at the time of the husband's death she is not his wife.  
2 Bl. 130. 3. 7. 5 Co. 98. 7. Co. 70.

But a partial divorce does not deprive her of dower except in case of elopement & adultery. and then it is this offence & not the divorce that bars her dower. 9 Co. 19  
Civ. Ch. 463. 1 Inst. 32. 3. 3 P. Wm. 246. 2 Bac. 142.

In Cont. even in cases of total divorce the wife is entitled to dower. provided she was not the faulty party or when she obtains the divorce by virtue of the statute. and the stat allows the Court to grant her not exceeding 1/3 part of husband's estate by way of present alimony.  
H. Con. 239. 279. 1 Swift. 192.

And by our Stat when the marriage is within the limited degrees. tho the marriage is declared void & the issue illegitimate yet the court may assign the wife a reasonable share of husband's estate not exceeding one third part. according to the best construction that I can put on it.  
H. Con. 479.

A wife after a divorce a mensa is not entitled to admit nor to her distributary share of husband's personal prop<sup>y</sup>. Revers 2210  
2 Kay 521. Cro. Eliz. 908. The Ch. 111. 3 Bl. 94. 5. As to howers the H. M. 2<sup>nd</sup> only reaches elopement & adultery but the Ecc. courts now say that adultery merely bars dower. —









225.

Parent & Child, including guardian & ward or as it is termed of infancys age, and immediately of the rights privilege and disabilities of infants.

By Eng. C.L. & our own law an infant is any person male or female under the age of 21. sometimes called a minor. 1 Bl. 463. Dic. sec. 106. 259. I would here observe that a popular error has prevailed in Eng. that females come of full age at 18. but there is no such law.

By C.L. full age is complete on the day preceding the 21<sup>st</sup> anniversary of ones birth and as the maxim is that there is no fraction of a day, the party is of full age the first moment of that day so that he may be of full age nearly 24 hours before he is strictly 21 years old. Galk 45. 625. 4<sup>th</sup> Rep. 488. 1096. Pou ser 144. 685 Ray 88. According to the civil law which prevails pretty much over the continent, full age is not complete till 25. 3 Bac. 118.

Of the privilege & disabilities of infants in relation to crimes, civil torts & contracts.

1<sup>st</sup> Crimes. No person is punishable under the Eng. law or our own, for any punishable offence or indeed is considered capable of committing it under the age of seven years. for under infants have not the power to will, and no one is to be punished for a crime unless his will concurred in its commission. &



the presumption in this case cannot be rebutted.  
 4 Bl. 20. 23.

At 14 a minor becomes capable of committing crimes and is punishable for them so far as relates to age, and even capitally. 1 Bl. 464. 2 ib. 22. 1 Hale 25. 1 Hawk 1.

The age then of which an infant is considered as capable of committing crimes is 14 yrs. Between 7 & 14. the infant is punishable of felony to be *deoli capax*. capable of distinguishing between right & wrong, or of legal judgment. It is said in some books that the presumption is in favour of the infant until 10½ and age to him between that & 14. but this opinion has been overruled and the presumption is now in his favour from 7 to 14. and the onus probandi lies upon the prosecutor. 1 Hale. P. C. 20. 26. 434. 1 Hawk 1. 1 Bl. 464 2 ib. 22. 3.

There are some cases in which infants above 14 are privileged as misdemeanors and offences not capital, but there is no rule to determine the precise cases and I am inclined to think that it refers to misdemeanors only. it certainly does not include votes. breaches of the peace &c. 1 Hale. 20 22. 3 Bac. 130. 4 Bl. 22.

But it is a rule of practice in criminal law that an infant is not to stand convicted upon his own confession without great caution. the law supposes him not to have discretion Co. 2d 465. Foster 7. And if he pleads guilty the court will enter "not guilty" jury. 1 Hawk 1 a jury.

The presumption in favour of infancy under 7 cannot be rebutted. and the procector is never allowed to prove such an one delinquent or capable of criminal intention.  
 Plow. 19. Corp. 2234. Foster C. L. 439. 1 Bl. 464. Lib. 387.

Gen. l. statute inflicting corp. punishment some times includes infants the note is simply named in other note. the books are confused on this subject but the rule appears to me to be this. that if the offence is made of such kind as is corporally punished by C. L. infants are within & punishable under the note included in the statute by name. But if it forbids an act not corp. punished by C. L. infants if not named are not within. As the case of forcible entry & detainer which note being made an offence or the offence not being made such an one as is punishable corp. by C. L. & infants not named they are not included. In this case however the infant will be punished as at C. L. 1 Hale 712. 3 Bac. 131. 1 Inst. 247. 357. 1 Hawk 1. Cro. J. 274. Plow. 364.

I. Kew says qd.

infants are the  
 same as persons  
 under 21  
 except as to defaults

As to torts. For torts as civil injuries infants are in general liable at any age. By torts are generally meant such injuries as are committed with force. By the civil law of trespass the intent of the act is not regarded so that a trespasser may be sued for trespass. for he ought to have the loss rather than the innocent one injured. and there is an instance of a recovery against an infant for putting out one's eye. It has been supposed in Com. that infancy was as much privileged in torts civil as in crimes. But it is a very monstrous.

q. 395.



Hol. 14.  
1 Sw. D. 521.

supposition. Suppose A in defending himself<sup>r</sup>  
B accidentally hits C who stood behind him. A  
is liable to C. altho he was doing his duty in the  
act by which C was hit. for the law does not regard  
the intent at all. 1 Font. 81. 1 Hawk. 3. 2 Roll. 547.  
91 in 395.

There seems to have been an opinion prevail-  
ing - the some is true that an infant was not liable  
for slander under 17. An infant in my opinion is liable  
for slander when he is *doli capax*. or capable of making.  
the same rule does not apply here as in case of torts.  
there can be no doubt but an infant of 14 may be bound  
in slander. for at that age he may be punished for  
feloins. May. 129. 3 Bac. 132.

The infant is liable to be  
punished as a common thief. after 14. his age merely is of  
no avail to him. before however the presumption is in  
his favour. his capacity is rebuttable in both cases. It is<sup>3</sup>  
that he is not liable in a civil action for fraud or deceit  
3 Bac. 132. 1 Sid. 129. 258. 1 Font. 71. Keb. 778. 905. 913.  
This doctrine has been disapproved by Mansfield & Traynor &  
it appears to me to depend upon the fact whether he is  
capable of a fraudulent intention. Thus suppose a clerk in  
a store should misappropriate the goods or assist in doing it.  
I have no idea that his age would excuse him. he would  
be liable after 14 & perhaps before. 3 Bur. 1812. Parker Rep.  
223.

When the ground of action is contract. cause of act-  
arising & contract in fact. the infant cannot be sub-  
jected by a trick of pleading making it sound in tort.

as in an act<sup>n</sup> b<sup>n</sup> ag<sup>n</sup> an inf<sup>t</sup> for abusing a horse that was bailed to him. the act<sup>n</sup> was made to sound in tort. but as the cause of act<sup>n</sup> was a breach of an implied contract the judge would not suffer the C. L. to be thus wasted. 8 T. R. 335.

There is a loose doctrine attributed to Parker & River that if a person takes upon <sup>him</sup> to act, and acts as if he were of age when he is not so. he shall not be allowed to prove his age. but this I take not to be law. Vin. 203.

There are some cases in which Ch<sup>y</sup> will enforce a contract against an infant for the ground of fraud that is to prevent fraud I would observe that the Chancellor is the paramount guardian of all the wards in the Kingdom and it is in this capacity that he acts while affording relief against fraud in such cases. 1 Fon 70. 1. 9 Mod. 38. 2 Eq. Ca. 489. 1 Bro. Cha. 353. 358.

In relation to the contracts of an infant and certain other transactions of a similar nature I would observe that in Eng. inf<sup>t</sup> have different capacities at diff<sup>t</sup> ages. by C. L. both males & females have the power of choosing guardians at 14. In Ct. male infants have the same power at 14 & females at 12. 1 Bl. 463. St. Con. 42.

the infants of any age may be Ex<sup>rs</sup> but he cannot act so as to bind himself until 17 and in the mean time an Ex<sup>r</sup> must be appointed durante minoritate cum testamento



annuo. and the infant when he arrives at the age of 17. is to finish what remains undone, the rights of the ad. ending at that time. The reason of this particular age being preferred is said to be because an infant at that age can make a will, but he can make a will much earlier. I consider the rule as a positive one. 5 Co. 20. Off. 64. 307. Salk 39. Hob. 250. 3 Bac. 121. Carth. 466. 7.

But no person can be admin<sup>r</sup>. until he attains the full age of 21. because an adm<sup>r</sup> is bound to give bonds: whereas an Ex<sup>r</sup> is not of course to give bonds. In Court both are to give bonds and it opens room for a question whether an Ex<sup>r</sup> can act in Court until 21. 5 Co. 29. Comb. 475. Carth. 446. 7. 5 Mod. 395. Hal. Com. 268.

Things.

of consent for marriage to be valid is, by C. L. 14 & 12. But as I have before observed if one is of the age of consent and the other not either may dissent before ratification 1 Bl. 436. 463. 1 Inst. 77. Stra. 937.

It is said that a female may be betrothed at 7 and if after her husband's death she is above 9 or according to some auth. 9 years of age, she is entitled to dower. Lit. sec. 36. 2 Bl. 131. 1 ib. 463.

By C. L. the age of disposing of personal property by will, by some is supposed to be 14 in males & 12 in females if of sufficient discretion there is however a great diversity of opinion on this subject others supposing that 15, 17, & 18 are the proper ages. it is

the prevailing opinion however that 14 & 12 are the  
higher age, <sup>of sufficient discretion</sup> that being the rule of the civil law  
which prevails in the spiritual courts. 1 Inst. 89  
2 Vern 104. 469. Pw. Cha. 316. 2 BCL 497. 1 ib. 463.

By Stat. of Con. the requisite age in both cases to make  
a will of personal property is 17. H. Con. 42.

An infant no  
person under the age of 21 can bind himself by con-  
tract. The contracts then of all infants are in genl.  
invalid i.e. they are either void or voidable. 1 Bl. 465  
But if an inf<sup>t</sup> & an adult join on one side in a contract  
the adult is bound the infant is not. Doug. 500. 8 Mod. 190  
1 Root 58.

So again if an adult contracts with an infant  
the former is bound tho the latter is not. for the pri-  
vilege of the infant is personal and the adult shall take  
no advantage of it. as if the inf<sup>t</sup> should deliver a horse  
in all cases where the contract is but voidable the ad-  
ult is bound. 1 Pow. 38. 1 Mod. 25. Cro. Ch. 502. 1 Vent.  
51. 4 Tra. 937.

And the rule is the same in Eq<sup>y</sup> in a  
case requiring specific performance & it is no objection  
that the inf<sup>t</sup> is not bound. But Ch<sup>y</sup> will never suffer  
an infant make use of his privilege to cheat an ad-  
ult. and having discretionary power they can  
impose such terms as to do complete justice. 9  
Vern. 393. 1 Pow. Con. 39. 40.

But this rule that one is bound  
and the other not does not hold when the contract is  
strictly void it applies only when the contract is valid or



only voidable, for when the contract is void there is no consideration. The adult is not here excused because of the infancy of the other party but because of the want of legal consideration to support his promise, although that is the legal consequence of the infancy. As if a man should engage to do certain things, provided an infant would give a pound of silver. The adult would not be bound for the power of the infant is absolutely void. *Atia. 938. 1 Pow. Cas. 31. -*

It has been questioned but I consider it good law. Infants may be bound by a contract if it is for necessaries. It is not binding on the infant if it is for a loan or a gift. *1st. 129. 1st. 169. 1st. 905. 913. 3d. 120. 1.*

I observe that if an adult and a minor make a contract the former is bound and the latter not. And it is said that if the infant has not the amount of the consideration accruing to him & afterwards voids the engagement he is not bound to restore, but it shall be considered as a gift to him. *1st. 129. 1st. 169. 1st. 905. 913. 3d. 120. 1.*

How far this rule may be subject to qualification or whether to any we do not find in the books. On principle however it seems to me that there are supposable cases in which the infant who has disaffirmed his engagement might be compelled to restore the consideration, as when the specific article remains in his hand as if it were a horse. It appears to me that he might be sued in trover on principle although I know of no such case.

Although the general rule of law is that an infant is not liable on his contracts, yet an infant may in some cases bind himself on his contracts for necessaries. Those articles which the

law deems necessary, as food, apparel, lodging, washing, medicine & instruction, such instruction Coke says whereby he may profit himself afterwards. 1 Bl. 466. 1 Inst 172 1 Roll 727. Cro. J. 494 8 T. Rep. 578.

That an infant is not bound of course in all cases for these articles. They must not only come within the legal definition or description of necessaries, but they must have been necessary for him at that time, his circumstances considered. Cro. Ely. 583. Cro. J. 560. Popk. 151 Palmer. 361.

The articles coming within the legal definition the question whether they were or were not necessary for the infant is a question of fact for the jury And to a plea of infancy, a general replication that the contract was for necessaries furnished is sufficient it not raising a question of law. Stra. 1101. Cro. Ely. 583 Carth. 110. 111 1 Foul. 68. 8 T. Rep. 578. Cro. J. 560. 4 Bac. 17.<sup>504.</sup>

And upon the same principle that an infant may bind himself for his own necessaries, he may bind himself for necessaries for his wife & children, for being of age to enter into the principal contract he must be liable for those that arise out of its relation. Stra. 168. Esp. Dig. 161. 3 Bac 133.

An infant is bound during coverture for the debts of the wife contracted before coverture whether necessaries or not is immaterial, provided she had the power to contract for them. For a reason similar to



that of the last rule. He takes the wife cum cura. Cam-  
 eratio. 95.

An infant cannot bind himself even for  
 necessities if he is under the care of a parent guar-  
 dian or master & provided for. - as the rule is established  
 from necessity that the infant may not suffer and  
 when there is no necessity the rule does not apply. 2 Bl.  
 446. 1325. 2 ed. 35. Peaker Rep. 229.

And when the  
 infant is thus under the care of a parent & who pro-  
 poses to provide for him. the case must be a very  
 strong one indeed in which he will be bound by  
 his contracts. for the law will not allow even parents  
 to interfere between parent & child. for it tends to  
 weaken salutary authority.

The cases then in which  
 an infant may bind himself are as respects his  
 circumstances of three kinds. 1 If he has no pa-  
 rent guardian or master 2 If his out of the reach  
 of their care. 3 If when under their care he is  
 not duly provided for. In the two last cases however  
 the parent is bound as well as the infant, as is  
 any one whose duty it is to provide for him. Pa-  
 rents are bound by law to provide for their chil-  
 dren. Guardians, as such, are not bound. &  
 the obligations of a master depend upon his con-  
 tract. The rule subjecting the infant is intended  
 for his benefit & relief and not for a discharge to  
 the parent &c. 1 Bl. 446.

You have a statute in Con,

enacting, that if a parent, guardian or master having an infant under his care allows him to contract even in his own name, the parent &c. is bound on such contracts and the child not.

This as I conceive does not vary the C. L. rule as to the infant's power to bind himself for necessaries. 4th. Con. 293. Kirk. 251. 287. 4 Day. 57.

If the circumstances of the infant are such as would enable him to contract for necessaries at C. L. he may do it. Almost notwithstanding the statute for it cannot be supposed to have been the intention of the Legislature to put it out of his power to get credit & thus make him suffer. For one respect however the statute does introduce a new law. That of allowing the infant by contracts in his own name <sup>not for necessaries</sup> to bind the parent &c. for by C. L. the parent &c. would not be thus bound. Under the stat. of Con. it has been determined that he would be. 4 Day 57. Kirk. 287.

In strictness however the infant is not bound at C. L. even for necessaries upon his ~~express~~ contracts for he is bound to pay only the true value of the necessaries which is not of course to the extent of his contracts. as if he should agree to pay \$100 for articles worth only \$50. he would be bound only for \$50. He is bound then not upon his ~~express~~ contract. but upon one implied by law. Cro. Eliz. 583. Cro. Jac. 560. Pop. 151. 1 Roll 729. Latch 169.

But there are certain distinctions to be observed as to the mode in which an



infant may bind himself for inciparis. The true principle ought to prevail. that an infant may bind himself in any mode that would leave the consideration open to inquiry. But the decisions on this point are not uniform. In the first place it is universally agreed that an infant cannot bind himself by a penal bond. Cro. Ely. 920. 1 Pow. Con. 54. Esp. Dig. 164.

But by a single bill he may bind himself for inciparis it once. Sta. 939. 1 Sw. 86. Chit. Bills. 29. 1 Tubb. 382. 416. 423.

3<sup>rd</sup>. By a negotiable note actually negotiated he is not bound. that is he is not liable to the endorsee. 1 T. Rep. 41. 1 Fomb. 73.

4<sup>th</sup>. By a note not negotiable or it would seem not negotiated he may bind himself for inciparis. Carth 160. 1 Fomb. 73. 1 Pow. Con. 34. 5. 1 Woodward 403. note.

5<sup>th</sup>. By a bill of exchange not negotiated it seems he may be bound, but if negotiated he is not bound in favour of the endorsee. Carth 160. 1 Fomb. 73. Chit. Bills. 29 to 38.

Lastly by an account stated he is not bound tho for inciparis. 1 Inst. 172. 1 T. Rep. 40. Latch 169. way 87. 3 Bac. 134.

Thus are the distinctions as to the forms by which an infant may bind himself in writing. The reason of the first rule as to the penal bond as usu.

ally given is that the formality is always to the disadvantage. This appears to me to go rather to the question whether the bond is void or voidable. - The true ground seems to be that the consideration is not examinable, for if the infant is subjected at all he must be to the whole amount. 1 Pow. Con. 36. Chit. Bills 29. 21. as to the first reason see Co. Lit. 172. a. Cro. Eliz. 920

The rule is that by a single bill an infant may bind himself for at the time this rule was established the consideration of a single might have been inquired into 1 Yel. 382. 416. 423. 1 Lew. 86. Chit. Bills 29.

But as

a general rule of law the consideration of a single bill is not now examinable. And it is said in Yelk that the way to get along with this is, that in the case of infancy the consideration may be inquired into. We have no case in point. The court then said that the Plff might reply in disparage, and he certainly would not be allowed to make a replication not traversable, and it is inferable from that case that the inf. cannot bind himself unless the consideration can be examined? 1 Y. Rep. 41.

As to Notes & Bills. When a negotiable note has been negotiated, the consid<sup>n</sup> cannot be inquired into in an act<sup>n</sup> brot. by an indorser, so that an infant could not be liable to him, but if the note were not negotiable or being negotiable if it were not negotiated, the infant may be bound, for it is clear that the consideration of a note may



be inquired into as to ~~the~~ the maker and the payee  
it being a simple contract. The rule is precisely  
the same as to bills of exchange. *Vind. Biles*. 155.  
*Chit. Biles*. 9. 20. 51. 82. 87. *Doug.* 614. 1 *Font.* 73. 1 *Pow.*  
*Con.* 34. 5. 341. 2 *T. Rep.* 71. 1 *Bl. Rep.* 445. *Praker* Ca. 61.  
216. 1 *Moore* 200. 1 *Exp. R.* 117. 262. *How.* 674.

By an account states an infant is not bound  
on action on it is on what is called an insinuated con-  
tract. And why it may be asked may not an  
infant thus bind himself? The reason  
is at hand for at the now the terms of the account  
can now be examined, yet they could not when  
this rule first obtained, and now the rule exten-  
derth the reason of it has ceased. *Lalch.* 169.  
*etoy.* 87. 1 *Pow. Con.* 36. 1 *Font.* 73. 1 *T. Rep.* 40. 42

In the case of a promissory bond another question  
may arise. Suppose the infant to have given a  
promissory bond, would he be liable upon the origi-  
nal simple contract or quantum valent? It  
depends upon the question whether the simple con-  
tract merges in the bond & that again upon  
another, to wit, whether the bond is void or void-  
able

It is clear that in the case of a single bill, the sim-  
ple contract is merged & if given for necessities binds the  
infant. If not given for necessities it is voidable only  
and thus the infant would not be chargeable upon the  
simple contract. *Bull. et P.* 155. *Pow. Con.* 218. *Exp. Dig.* 164

We have had a variety of decisions in Con. on notes given by infants at one time they have been declared void at another voidable only. 1 Root 58. 477. 2 W. 105. 109

For money borrowed an infant is not liable unless it is actually laid out in the purchase of necessaries. And by law the infant is not bound unless the lender himself laid out the money. for to recover on a contract at law it must have been good at initiation not made so by something at post facto. If the lender lays out the money himself he can recover to the true value of the articles but no further. he being virtually the vendor & recovers as such. In strictness then the infant is not liable at all at law as for money borrowed, but he is liable in such case as for necessaries furnished. Salk. 279. 286 5 Mod. 368. 1 Pow. Con. 37. 10 Mod. 67.

But in Eq<sup>y</sup> the infant is bound if the money is actually expended for necessaries even by himself. for Eq<sup>y</sup> can enforce the contract as it appears beneficial to the infant in its result. putting the lender in the place of the vendor. 1 P. Wm 583. 558. 2 Eq. Ca. abv. 516. 1 Pow Con 37.

An infant is not bound by his contracts for articles to maintain his trade. the law not trusting him with discretionary power altho thin are a kind of necessaries yet they are not what the law deems such. Co. 11494 Salk 279. 1 Roll 729. 1 Pow. Con. 36. 1 Mac 183.

And an infant cannot



bind himself on a contract to pay for the repairs & maintenance of his buildings. for however necessary they may be, it is presumed that his guardian will take care of this thing. 3 Talk. 116. Pow. Con. 36.

It has been said however that if an infant takes a lease of a house or land & occupies it till another day, the rent not being above the value or not unreasonable, he is bound to pay it. This may be what we call in common parlance necessary, yet it is very far from legal necessities. The only reason for it seems to be that it is lodging but that counts not apply to land. Cro. St. 320. 2 Bbls. 69. Pow. Con. 35.

It has been determined that an infant could not bind himself by contract to pay for instruction in music or dancing. this not being deemed in law necessary instruction. You will observe that this decision was in the reign of Car. 2. For the present day however dancing might be that necessary for youths of a certain class. Courts now are extremely careful of extending the rules on these points. 1 Pow. Cont. 36. 1 Lick. 446.

All these cases come within the general rule that an infant cannot bind himself by contract except for necessities.

If an infant does voluntarily that which he is bound, or may be compelled by Law or Eq<sup>l</sup>. to do, he is bound thereto. As in case of infants parcells dividing their lands, unless indeed it can be shown that there was something fraudulent or unfair in the

division. So also if an infant pays out upon a lease that has been transmitted to him by his parent or by gift or devise or descent. he cannot recover it back.

Again if an infant sets off down to the widow or if having received the interest of a mortgage he, on pay<sup>t</sup> releases to the mortgagor it will bind him. In such cases he discharges a duty that devolves upon him by law in consequence of a right that he enjoys. This is perhaps the only class of cases in which an infant is bound at law by his contracts except for necessaries. 3 Bur. 1801.2. 1 Inst. 72a. 315. a. 9 Co. 85. 1 Bl. Rep. 575. 4 Cr. Dig. 15. 3 Bur. 1794.

You have a statute in Con. providing, perhaps unnecessarily, that, if the interest of a mortgage <sup>by purchase or descent</sup> vests in an infant, his guardian may, on pay<sup>t</sup> of the debt release the mortgage. And a later stat. allowing an Ex<sup>r</sup> or adm<sup>r</sup> to exercise the same power. Stat. Con. 222. lib 2. 130. 164

An infant Def<sup>t</sup> is bound by a decree in Ch<sup>l</sup> except that he is allowed six months after attaining full age to impeach it for fraud or error. if in the mean time no fraud or error is shown he is bound. 2 Vern 342. 429. 1 ib. 295. 2 Inst. 351. 1 P. Wms 504. 2 ib. 401. 3 ib. 352. 3 Attk 626. 1 Font. 75.6

And an inf<sup>t</sup> Def<sup>t</sup> is as much bound by a decree in Eq<sup>l</sup> as an adult unless he can prove fraud or gross neglect in his guardian or next friend by whom the



suit was brought 3 Attk. 626. 1 Fombl. 75.

Such acts, again of an infant as do not affect his own interest, but take effect from an authority that he has a right to exercise, are binding. As a power of atty. to transfer Bank stock, no interest of his being undamaged, he acts merely as an agent, no discretion is needed, physical power is all that is requisite.

again if an inf. 3 or 4 of age to act, pays debts, receives dues & receipts, then such acts are binding, provided there is no fraud or unfairness in the proceedings. So if an infant does an act in the exercise of a ministerial capacity, which by law he has a right to do, 3 Bur. 1802.

A promise made after full age will bind the promisor to a contract made before when the contract was not for necessities. This however holds of such contracts only as were originally voidable only & not void, for a contract strictly void can never be ratified, it is a mere nullity, 2 T. Rep. 766. 1 Stra. 690. 2 Vent. 203. 1 T. Rep. 648. 1 Font. 131. 2 Esp. Dig. 163.

And if he should have given while an infant a written security which is absolutely void, a promise after full age will bind him, not indeed to the performance of the void contract as a ratification of it, but to the performance of the original contract, of which the former delivery was a

Unacknowledged is not sufficient, there must be an express promise to pay, 2 Ld. Raym. 1. Com. 20. 163. 264. R. 625.

good consideration. Bull. N. P. 155. Esp. Dig. 164. 3 Dec.  
134.

But if the written security had been but void-  
able the rule would be different. for the former part  
promise or contract having merged in the written  
security it could not remain a consideration for  
the subsequent promise. so the latter promise would  
not be binding; thus far the books go. This subse-  
quent promise would however ratify the former  
voidable security which is precisely the same  
thing in effect. and in this case the action should be  
brought upon the voidable security. or that which was void-  
able viz. the simple contract. Thus an infant to a char-  
iot horses. are a 5<sup>th</sup> br<sup>o</sup> upon a promise to pay a single bond  
he had given for them. could not be sustained the contract  
being extinguished by the bond. could not be a consid<sup>er</sup>-  
for the promise after age. the reporters go no further in  
the case. Mr Gould observes that an action on the sin-  
gle bond would have lain. Bull. N. P. 155. 1 Root. 58.  
Esp. Dig. 164. "Most Questions"

When however a person after full age makes  
a new promise, he is bound only to the amount of the  
new promise. as when one engaged to pay half a crown on  
the pound. in such case he is considered as waiving  
his defence of infancy as to so much. Esp. Dig. 164

And when to a plea of infancy. Plff replies promise after  
full age. & Def<sup>t</sup> rejoins no such promise after full age &  
issue is joined. it is enough for Plff to prove the new  
promise. altho the assertion of full age is part of the resp<sup>o</sup>.



and the proof that Def<sup>t</sup> was not of full age lies upon Def<sup>t</sup>. it being a fact within his knowledge & not within the Plffs. Esp. Dig. 164. 1 F. Rep. 648. 3 Bac. 132. note

When an infant is sued & arrested in an action to which infancy is a good defence, he cannot be discharged on motion as a free court can in such a situation, he is left to his plea, the reason of the difference is that the incapacity of a free court is total; that of an infant only partial. 1 B. & P. 480. post 271

What contracts made by an infant are void, and what only voidable.

It follows you will perceive from the rules already given, that the contracts of an infant, except those for necessaries, being invalid are either void or voidable.

And I would premise, that courts of justice are of late inclined to construe the contracts of infants voidable rather than void. 1 Bur. 566. 3 ib. 1805. Stra. 938. 3 Bac. 132. note and this construction when properly considered will be found very advantageous to the infant. it was formerly that to be for his interest to construe his privilege strictly, but it is not so. for if the contract is considered voidable only, he may on coming of age turn it to advantage by confirming or avoiding it at his election and the other party is prevented from taking any advantage of its invalidity.

On the general enquiry as to the contracts being void or voidable, the first genl. rule is, that, those contracts made by an infant, in which there is an apparent benefit or semblance of benefit to himself are only voidable, but that those in which there is no such apparent benefit or semblance of benefit to the infant are void. Cro. Ch. 502. 3 Mod. 310  
1 Roll. 730. 1 Pow. Con. 33. 38. 54. 2 Hen. Bl. 511. 3 Bac. 136.<sup>578</sup> 125.

As to the last branch of this rule I will suggest that I very much doubt the generality of its application, the truth is there is a vast deal of contradiction in the books on this subject & the true distinction does not appear well settled.

However as to those which are apparently for the benefit of the infant, they are said in the first part of the rule to be only voidable. Hence purchases made by him as by deed of gift or lease &c are only voidable. 1 Inst. 2. 3. 8. Cro. J. 320. 2 Vent. 203.

Upon the same principle a power of advowson given by him to accept a vicar, or any other interest to the infant is only voidable, & if the party does accept in the name of the infant, the conveyance is but voidable. 3 Bur. 1808.  
1 Roll. 730. 3 Bac. 136.

It has also been determined by an infant slave has been determined to be voidable only because it may better the condition of the infant by emancipation. 2 Hen. Bl. 511.

But under the last branch



of this rule it has been said, that a <sup>lease</sup> by an infant not  
reserving rent or a very inadequate rent is void.  
Moon. 105. 2 Lon. 216. Doug. 337. But. 102. Noy. 130.  
3 Benc. 137. <sup>598</sup> 304. It is very obvious that this rule in  
practice must be very inconvenient, as you must  
go to extrinsic facts to give construction to a legal  
instrument, the sufficiency of the rent being to be tried  
by jury. therefore the rule has been doubted & denied.  
and altho the rule is so often mentioned yet there is  
no judicial determination applying it. 3 Benc. 1806.  
3 Benc. 137. 304.

There are also some very authoritative  
decisions against the rule as Co. Lit & Mansfield  
who declare the law to be but voidable. Lit. sec. 547  
1 Inst. 45. 308. 1 Ch. b. Mon 78. 3 Bac. 304. 5 id. 538.  
without any reference to the rents.

But 2<sup>d</sup> means field has not only denied the application of the rule in this manner but has absolutely disproved it to a demonstration. and first it is a matter of common experience that an infant may make a lease without rent to form an agreement to try his title, And what is decisive, the lessee can in no case avoid the lease on a 2<sup>d</sup> of years infancy. this is what I call demonstration. - If the lease were void the infant could not recover the rent. but in truth he could recover the whole amount of rent & profits which would be very iniquitous. This consideration of the case of the lease, tho I would not say it is of the great abstract distinction. 3 Bur. 1794. 1806. 1 Pow. Con. 38

1 Bl. Rep. 378. 1 Foubt. 74. 2 T. Rep. 161.

I will further observe that an infant cannot plead non est factum to his lease, this however does not decide the question whether it is void or voidable, because he cannot do this when it is void. Cro. Eliz. 857. 10 Co. 43. 5 ib. 119.

Under the second part of the general rule it has been said that a penal bond given by an infant is strictly void as the penalty of the bond cannot be said to be advantageous to him. 1 Roll 729. Cro. Eliz. 920. Hutton 106. 3 Bac. <sup>595</sup> 134. 5 ib. 334. 1 Pow. Con. 54. Esp. Dig. 166. These cases & opinions go to support the proposition that such bond is void, see contra. 3 Bur. 1804. 5. Lit. sec. 259. Perkins sec. 12. 154. 1 Woodd. 403. 1 Inst. 172. (see most questions) G.<sup>d</sup> I think it voidable. 1818.

It is agreed that an infant cannot support a plea of non est factum by proof of infancy whether the bond is void or voidable, Salk 279. 5 Co. 119. 2<sup>d</sup> Ray. 315. Pow. Con. 47.

If an infant having given a penal bond be guarantor property for the pay<sup>t</sup> of his debts, a court of Eq<sup>t</sup> will order payment of the bond debt. 1 Foubt. 74. 1 Pow. Con. 37. 1 Woodd. 403. 1 Eq. Ca. 282. 3.

The first branch of the genl. rule above given, is confined to purchases and acquisitions by the infant which are supposed to be for his advantage, and according to principle the latter branch relates to sales, conveyances, leases & obligations made by him. As to this latter part there is another



general rule that I take to be the true one in preference to the old one before spoken of, to wit. That all gifts, grants, sales, deeds & obligations made by an infant, that do not take effect by manual or actual delivery, are void, but that those which do thus take effect are voidable only. This is the great criterion laid down by Perkins. Perk. sec. 12. 19. Litt. sec. 259. 3 Burr. 1804. 5. Latch. 10. 3 Bac. 136. 139.

Thus a possession made by an infant is completely only voidable, for here the interest passes by the living of seisin or actual delivery of the subject at the time. It has been said to be only voidable because of the solemnity of the transaction but I do not see the effect upon the question. Perk. 259. L.C. 135 8 Co. 22. 3 Burr. 1804. 5. 1 Inst. 247. 389.

So if an infant sells a specific chattel as a horse & delivers it the contract is voidable only, but if a contract is made without delivery, and the party takes the horse in pursuance of the agreement, he is a trespasser and may be treated as such, and the horse restored, whereas if the agreement were truly voidable but by demand or due course of law, this distinction depends upon the principle above laid down. Perk. 12. 19. Hob. 77. 1 Roll. 730. Latch 10. 1 Inst. 428.

The words "which take effect by delivery" are an essential part of the rule of discrimination as well with respect to deeds as to the actual delivery of specific chattels. Other words of course make

a difference between those deeds which convey a hereditament in trust or a deed of gift and those which convey or delegate merely a power. the first are voidable only, the latter void. *Park 12. Lit. 259. 8 Co. 42. b. Chapp. 60. 5 Co. 119.*

Hence if an infant delivers a deed of conveyance & afterwards attaining full age redelivers it. the redelivery has no effect as a delivery. it only ratifies the former delivery which was voidable. In case of a power-covert the deed is effectual only from the redelivery after coverture determined. the former delivery being void. *Park 154. 5 Co. 119. 4 Cui Dig. 129. Chapp. 60.*

But on the other hand to exemplify the other part of the rule viz. that those deeds &c which do not take effect by delivery are void. A power of att. made by an infant. as to convey his inheritance is void. & if a conveyer enters under a conveyance made by virtue of it he is a trespasser, the instrument does not create or convey any immediate interest. the delivery of it effects nothing. it delegates a naked power & that is all. These two examples explain the whole rule. *3 Burr. 1804. 1808. 2 Roll. 2. Noy. 130. 1 Bl. Rep. 577. 8. 1 Ann. Bl. 75. 1 Vern 536.*

It will then be seen that a power of att. made by an infant to accept a lease is only voidable. it being an act introductory to a purchase. does not interfere with this latter rule which does not relate to the purchases of infants but to sales conveyances &c. made by them. *1 Roll. 730. 3 Bac. 186. 3 Burr. 1808.*



11<sup>th</sup> Point. I am now and, since, the correctness of this latter rule and pursue the old rule by which it is determined whether the instrument is void or voidable according as there is an apparent benefit or semblance of a benefit flowing to the infant or not. There are many authorities to support each rule, and both being of a positive nature the weight of authority must decide the question, and it would not be very material which way provided one was fully established that the truth is the authorities are contradictory & irreconcilable. Pow. Con. 32.3.

Now I must confess that the law upon this head appears to me to be contained in the first branch of the old gen<sup>l</sup> rule, relating as I conceive to purchases made by an infant which it declares only voidable, being considered as advantageous to him. And with regard to those contracts that divest him of an interest, that rule appears to me to be vague & inconvenient in as much as you must resort to extrinsic evidence to determine their validity, neither is it supported by the best authority or by reason, for it evidently would be more for the infants advantage to determine them voidable, as to the conveyances grants proffments, &c. I take the rule to be, that if the instrument takes effect by delivering to create an immediate interest it is voidable only, if it does not create such an interest it is void.

This I take to be the doctrine of Lord Mansfield 3 Burr. 1804. But he qualifies in one particular &

I think very properly, in one particular viz, that if in any given instance, construing the contract voidable only under the general rule, would not sufficiently protect the privileges of the infant, let it be construed void.

This would be reconcilable with the case in *Yield*, where an outfit hairdresser agreed with a girl for so much weight of her hair, contrary to her expectations it took all she had, and she brot. *Yield* against him. - He contended that as an immediate interest passed by delivery, the contract was voidable only so that at most trover only would lie against him. But the court held that such reasoning would deprive the infant of her privilege, because a restoration of the hair would be no remedy to her & if trover were brot. she could only recover its value, which would be no remuneration to her: the rule then as qualified would here affect justice. 3 Knt. 369.

Again suppose an infant sells & delivers a horse to a bankrupt. here if the contract were voidable merely, the infants remedy would be likely to be uncertain, let it then be considered void, and the bankrupt be arrested. I have to remark again that the cases are irreconcilable, this however appears to me to be the better rule as supported by reason & the best authorities.

I have hitherto spoken of executed contracts as sale, conveyances &c. - An Executory contract made by an infant it tends to be only voidable, as a bond against singling promissory note. 2<sup>d</sup> *Keyser* is shewn to this and some others. 1 *How. Con.* 308 and *Knt.* 1. *Sta.* 85. 937  
1 *Knt.* 51. 1 *Lid.* 41. 3 *Co.* 36. 5 *ib.* 47. 5 *Comm.* 160



It may appear to some that this distinction between void & voidable is technical & artificial merely, but it is as of much practical importance as any one in the law. If a contract is voidable only it can be ratified and a party <sup>only</sup> interested & engaged it may take advantage of its invalidity. But if void it can never be ratified & third persons make take advantage of its invalidity. Cow. 38. 1 Mod. 25. 2 T. Rep. 683. 4 C. 124. 3 id. 22. 2 Hm. Bl. 511 3 Burr. 1804. 6. 1 Font. 74.

Ratification of a voidable contract after full age may be either express or implied by acts manifesting the intention. as if a person continues in possession after attaining full age, the lease is ratified & he becomes liable for rent arrears, which accrued during his minority for the ratification made the lease good ab initio 2 Buls. 69. 1 Font. 132. 3. 3 Co. 65. Stra. 690. Cro. Jac. 320. 2 Vent. 203. Co. Det. 3a.

A void contract on the other hand is incapable of confirmation, for in judgment of law it is a mere nullity, so that there is nothing to be confirmed it is a legal non entity. An infant having made such a contract may, on coming of age or on another like it, or rather a new one, then takes effect only from the making & has no relation or operation upon the rights of the parties between the time of making the void & the new contract. 2 T. Rep. 766. 3 Co. 61. 1. Doug. 53. Comp. 201. 482. 7 T. Rep. 83. 1 Attk. 354. 1 Cow. Cor 33.

the infant having made a conveyance by fine or recovery may during

his minority but not afterwards, avoid it by writ of error. The reason is that as this is a writ opposed to him his age cannot be tried unless by inspection, after he is inspected other evidence is admitted, but never without the inspection. 1 Inst. 380. 12 Co 122. 3 Mod. 229. 12 ib. 197. 1 Pow. Con. 21. to. 23.

As to an infant's conveyances by any thing but matter of record which are called conveyances in pais, or proffment, it has been said that it may be avoided either <sup>minutely</sup> during minority or afterwards. 1 Inst. 247. 248. 38. but this I take not to be law. and it appears to me settled that it cannot be avoided until after ~~the~~ <sup>the</sup> attaining full age. the reason is obvious, for if he should enter to avoid the proffment then acts would be equally voidable, the law not permitting him to be bound by any more than the actus 3 Burr. 1794. 1808. 1 Bosl. Rep. 579. 2 T. Rep. 161. 3 Bac. 136

And the rule is not confined to proffments, it is the same if the grant <sup>be</sup> by lease & release, or whatever instrument may be the mode of conveyance.

If an infant makes a lease for years the rule is the same, altho the contrary is said in 1 Inst. 380. but it has been determined by Mansfield J. & Bull. that he cannot avoid such lease during minority & for the same reason. 2 T. Rep. 161. 3 Bac. 137. 8. 140.

So far as I can discover, the true rule as to sales of personal property is, that he may avoid such sales at any time as well during minority as after, for such property being considered of a perishable nature, if he wishes to



take advantage of his privilege he must do so speedily and I find no rule contrary to this. indeed such an one would in most cases defeat the infants power of avoiding his contracts. 3 B. & C. 141.

The infant before is liable during infancy to pay rent. that is. to an act<sup>n</sup> for it. for as he chooses to take advantage of the lease. he must be subject to its incidents. 3 B. & C. 141. 69. 1 Pow. Con. 35.

I have thus far in relation to the contracts of infants. considered them as they are viewed in courts of law and in general they are regarded in the same manner in courts of Eq<sup>y</sup>. But there is a class of exempt cases as they are called by which an infant is bound in Eq<sup>y</sup>. this he can- ly would not be at law. Thus marriage settlements made in contemplation of marriage to provide for a family and made with consent of parents or guardian are in most cases binding in Eq<sup>y</sup>. tho they would not be at law. Be- cause as the infant is capable of making the principal contract it is but just & reasonable that he should be bound by such contracts as are that accessory to that. 1 Bro. Cha. 152. 1 Pow. Con. 42. 44. 3 4th. Ed.

And courts of Eq<sup>y</sup> assume a discretionary control over infants & direct their con- science according to the circumstances tho the L<sup>d</sup> Cha<sup>n</sup> being considered the paramount guardian of all the minors in the Kingdom standing in the place of the King and acting by his authority.

According to the cases decided under this head Ch<sup>l</sup> appears to have considered that the

was a difference between the situation of male & female infants and have enforced the marriage contracts of the latter farther than they have those of the former. You have no rule making any distinction, neither do I see room for any. But there are cases apparently predicated upon such distinctions.

It has been determined that the interest of a female infant in a money portion, was bound by an Est. agreement before marriage. 3 Attk 613. 2 Vern. 501. 1 Bro Ch. 111. 2 Am. Dig. 19. 1 Pow. 44. to 46.

And it makes no difference in this respect whether the interest be in possession or expectancy. She is equally bound in both & the rule is the same indeed when the interest depends upon a future contingency, it being uncertain whether it ever vests. 9 Mod. 101. 1 PM. 574. 3 Attk 608.

It has also been determined that a female infant may bar her right of dower by accepting a settlement by way of jointure & so even if of personal property which could not bar an adult wife at law. being made with consent of parent or guardian. Indeed this consent is supposed in all these cases when the contrary does not appear according to the first gen. rule. 2 Eq. Ca. 101. 2. 5 Bro. Par. Ca. 576 1 Hy. 55. 1 Pow. An. 53.

Whether a male infant under such circumstances could bind his real estate by a similar agreement does not appear settled. Cruise says he cannot. I see no ground of distinction between the case of a male & female infant. To make the case



in such the question must relate to the husband's right to the custody. 1 Font. 68. 70.

It has been determined that a male infant's lease for lives may be bound by such agreement when made with consent of parent or guardian. 104. 1 Pow. Con. 52. 3 P. Wm. 229.

And <sup>1</sup> L<sup>d</sup> Rayfield once held that, with respect to a female infant seized in fee, if she contracted with consent of parent or guardian on adequate consideration, to convey her inheritance to her husband. Eq<sup>t</sup>. will enforce the contract. <sup>1</sup> L<sup>d</sup> Hardwicke said of this rule that it was going a great way, but that there are cases in which it would be correct to be governed by it.

<sup>1</sup> L<sup>d</sup> Thurlow absolutely denied the rule & said that the infant's estate would not be bound unless she had a settlement and actually entered upon to enjoy it after her husband's death, in other words settled & after coverture determined. I give you the case thus fully that you may have the state of authority. If it were worth while for me to say and an opinion. I should say that <sup>1</sup> L<sup>d</sup> Thurlow appears the best for the rule seems to fan down the privileges of infancy on both sides until there is nothing left in the middle. 2 P. Wm. 243. 1 Pow. Con. 48. 50. 3 Attk 613 615. 4 Cr. Dig. 16. 17. 18. 1 Bro Cha. 116. <sup>2</sup> L<sup>d</sup> Thurlow's opinion 1 Bro Cha. 510. 3 Wood. 453. note. & support it.

If it is asked why she cannot bind her inheritance as well as her lease &c. I answer that the reason

of them being bound is from necessity in making family provisions, and the rule should not be extended upon the privilege of infancy. This necessity does not require that the estate be bound except during coverture or their joint lives, and there is no need of exhausting the whole inheritance.

And it seems agreed that a contract by a female infant to bind her real estate must be made before marriage or it cannot be executed, seen in Chl. 3 Bro. Cha. 514. 3 Atk 56. 1 Foul. 70.

The great question whether a male infant can bind his real estate by such an agreement is not settled. Crisp says he cannot & I think correctly. for our maxim applies to both male & female infants. But it is settled that if a male infant married to an adult covenants that her real estate shall be settled to certain uses he shall be bound by it, for the adult is capable to convey, and the infant only abandons some rights he might acquire on the property during life, by the marriage. 2 Bro. Cha. 514 1 Foul. 70. 4 Crisp Dig. 19

But no agreement whatever made by a male or female infant before marriage will bind his or her estate, unless it is fair & reasonable & on adequate consideration, indeed all these affirmative rules must be taken with this qualification, for the power of a court of Chl. is discretionary & will not otherwise interfere there. 2 P. W. 246 2 Bro. Cha. 115. 16. 152. 3 Atk 618. 1 Foul. 69. 70. 1 Pow Con. 47. 50.



If an infant capable of making a will bequeaths personal property for the payment of his debts. his Ex<sup>r</sup> is bound to pay them. altho the infant was not bound to pay them. for if he can make voluntary grants or donations he certainly may discharge his conscience by ordering his debts paid. Indeed it may in strictness be considered as a legacy to the creditors to the amount of his debts if you please. 1 Eq. Ca. 282. 3 Bac. 146. 1 Modd. 403. 1 Pow. Con. 37. 1 Forb. 74.

I have already shewed that an infant may after he attains full age ratify a contract made during his minority. and it will bind him. An in Eq<sup>t</sup>. this may be done by an exp<sup>ress</sup> or implied ratification and that altho the original contract was made by another, and be binding upon him. Thus land was owned by six minors. the mother <sup>not their guardian</sup> leased it for 21 years. and the owners as they came of age impliedly ratified the lease by the acceptance of rent. this bound them. altho the contract originally conveyed no interest & as to them was void. 1 Atk 489. 3 Bac. 140.

These are the principal cases in which an infant can bind himself in Eq<sup>t</sup>. when he could not at law. But I would again observe that the contracts of infants are generally considered in Eq<sup>t</sup> as they are at law.

What powers or authorities an infant may execute. It is a settled rule that infants cannot execute a gen<sup>l</sup>. power over real estate & upon did upon is supposed want of discretion. I suppose some one devised land to

the use of such persons as e.g. a minor shall appoint.  
 A.B. cannot appoint for it requires a discretion to select  
 which the law supposes him not to have. 1 Vy. 298. 302  
 3 Attk. 695. Pow. Pow. 47.

But a naked special power may  
 be executed by an infant. by a naked power is meant  
 a power without interest, a power over another's property the  
 execution of which does not affect his own rights  
 & being special requires no discretion. Thus A. gives a  
 minor a power to execute a deed of land in fee to A.B.  
 the execution requiring only physical strength enough to write  
 the names. it is a mere ministerial mechanical act.  
 3 Attk. 710. 714. 1 Inst. 52. Pow. Pow. 43. 48.

But he cannot ex-  
 ecute a power over his own inheritance. for if he could  
 his own interest would be affected & his privileges infringed.  
 As if a devise was made to an infant of land in fee  
 with a power to convey to whom he pleased. he takes the  
 land but not the power. for that would be to part  
 with his own inheritance. Pow. Pow. 49. 1 Vy. 306.

There  
 is a particular rule laid down incorrectly by the reporter  
 in which L<sup>d</sup> Hardwick is made to say that there is no  
 case in law or Eq<sup>y</sup>. from which it is inferable that an inf.  
 can execute a power over real estate. we are doubtless  
 to understand a gen<sup>l</sup>. power. it is otherwise incorrect. I  
 mention it that it may may not lead you into a mis-  
 take. 3 Attk. 710. 3 Bac. 188. not.

The general rule then  
 seems to be. that an infant not interested in the subject



may execute a power so as to bind his principal, to the extent of it, if it does not amount to a discretionary power over real estate. for you will remember that he may at higher age execute discretionary power over personal estate by will. 1 Vy. 384 386. 1 Pow. Com. 230 & annex.

For he may execute even a general power over personal estate & this he may do, or as to affect his own interest, provided he is old enough to make a will of personal property, but not without. Sup. from personal property bequeathed to an infant with power to dispose of it to whom he pleases. now the it is given to him & he may retain it, still he may dispose of it if he pleases being of sufficient age to make a will, and yet he could not dispose of it otherwise than by will unless under the power. then he might dispose of it by will without the power. Pow. Pow. 54. 1 Vy. 383

And when an infant being heir at law for life with power to make a jointure, covenanted to settle a certain part on his wife for life the covenant was enforced in Ch. the power you will observe, was special, on the person who should be his wife, for life, it was not discretionary. 2 P. W. 229. Stra. 604.

And it is intimately connected with this subject to enquire What offices an infant may hold & execute. civil authorities or powers. It is laid down in the books that an infant may hold a ministerial office requiring only skill & diligence. tho he cannot a judicial one, as steward bailiff jailor &c. 1 Inst. 36.

Cro. Ely. 636. 7 3 Bac. 123. 125. 725. 736. 3. in off. 133

The reason assigned  
is that if he is not actually capable of executing it, even  
want of dissection, it may be executed by deputy 3  
Bac. 125. 724. 5. 736. 738. 11 Co. 4. Cro. Ely. 270. 556. 2 Rob. 153.

This reason seems to furnish a criterion for the first question  
for if the ministerial officer could not be executed by deputy  
the infant could not hold it, for it would not  
come within the reason of the rule. Cro. Ely. 636.

But in

Con<sup>n</sup>. I have never known an infant hold any office and  
as far as we are able to determine it would seem that he  
cannot hold one, and the Eng. rule not to apply to us or  
not extensively at any rate from the different species of  
our government. An Eng. officer are sold & held, in  
fee, in tail, for life & for years, and are among the  
enumerated sorts of incorporeal hereditaments.

the

infant cannot be an att<sup>y</sup>. it is said because he can-  
not take the oath. But I conceive that a better reason  
is that the officer is not merely ministerial, for a min-  
isterial officer does precisely as commanded by his  
principal, an att<sup>y</sup>. is not so completely commanded  
by his client. 3 Bac. 126. note.

the infant cannot be a

juror because, it is said, he cannot take the oath, the fact  
is the officer is strictly a judicial one. Hob. 325. 3 Bac. 126  
That an infant may be an Ex<sup>r</sup> at any age but cannot act  
until 17 An Ex<sup>r</sup> is deemed an Officer, an att<sup>y</sup> an agent.



And when an infant can hold & execute an office, he is bound by all his official acts and liable for his neglects of duty. Thus an infant justice is liable for an escape as if he were an adult known in the form of an action of debt if the escape is in execution. 5 Co. 27att. 8 ib. 44. b. Plow. 364. 3 Bac. 125. 2 T. Rep. 129. -

How far an infant is affected by the non performance of a condition annexed to his office or estate.

Conditions known in the law are of two kinds express & implied. By an express condition an infant is bound. If therefore he holds an estate with an express condition annexed imposing a forfeiture in a certain event, he will forfeit the estate by non performance. Thus if the title of a mortgage descends to an infant & he fails to pay at the appointed time he forfeits as an adult does, for pay<sup>ment</sup> at that time is an express condition and if he does not perform it, he can have no claim to the estate. 1 Inst. 246. b. 2 Vern. 560. 333. 343. 2 Lev. 21. 8 Co. 46. Carth. 43.

This rule however does not hold if the condition be a penalty distinct from a forfeiture of the estate, as a collateral penalty, the infant forfeits nothing by non performance. Thus a lease descended to an infant conditioned that if rent is not duly paid, the whole rent is to be the penalty, which might be forfeited by an adult, but not being a condition upon which the estate is held, it cannot be enforced.

against the infant 2 Bac. 129. 1 Vent. 200. Carth. 43.  
1 Inst. 246. b.

Implied conditions may be imposed either at C.L. or by state. As to implied conditions at C.L. and founded as it is upon skill & confidence, the infant is bound by them. Thus if a ministerial officer is granted or assigned to an infant, he forfeits it by mismanagement, or undue & unskillful execution of its duties. because the condition implied by the C.L. is that he performs them faithfully & skillfully. and he is also guilty of a breach of trust & a violation of good faith. Cro. Ch. 556. Co. Litt. 233. b. 8 Co. 44. b. 1 Fomb. 82. 3.

But by such conditions imposed by the C.L. as are not founded in skill & confidence an infant is not bound. Thus if an infant who is a tenant for life makes a conveyance in fee, he does not forfeit his life estate as an adult would have done but there is no breach of trust, no violation of good faith as before, and the law attributes the act to his want of discretion. 8 Co. 44. b. 1 Roll. 85. 1 Inst. 333. b.

As to conditions implied by statute, the rule is, when the statute gives a recovery by action against the tenant for non performance or breach of condition an infant is bound & forfeits, as if the infant tenant commits waste. the stat. Gloucester giving a recovery by action. Plow. 344. 1 Inst. 54a. 8 Co. 44. b. 2 Bl. 283.

But whenever the statute gives the



party injured by non-performance or breach of condition, a right of entry merely and a right of recovery by action, the infant is not bound of course the forfeiture not incurred. Thus the stat. of an ordinance provide that, if the tenant alienes in mortmain, the L<sup>d</sup> may enter but does not give him a right to recover by action. Perhaps I do not see any ground for the distinction in the two cases. 8 Co. 44. b. 1 Inst. 333. b. 1 Font 82. 3.

But infants are bound as well as adults by statutes of limitation, unless there is an express exception or special saving in their favour, which there generally is. It is often said that no laches shall be imputed to an infant. I yet it seems to be an agreed point, that infants are bound by these statutes unless they contain an express saving in the favour of infants, and the reason seems to be that these statutes are considered as a condition annexed to a right, or rather to a remedy. 1 Ch. 31. 1 Eq. Ca. 304. Pr. Cha. 518.

There is a rule laid down by good authority, that, if an Ex<sup>r</sup> Adm<sup>r</sup> or Trustee for an infant, does not sue in behalf of the infant within the time prescribed by the stat. of limitation the infant is bound notwithstanding the saving in the stat. in favour of infants. We have no explanation of this rule, but I conceive that it relates to those cases in which the Ex<sup>r</sup> or other representative has a right to sue in his own name, and if damage ensue because he is negligent, he subjects

himself to the infant. Then a parcel promise was made to A who dies and his Ex<sup>r</sup> or Ad<sup>r</sup>. does not sue within the time prescribed by the state of Ch<sup>a</sup>. the infant who is entitled to a distributive share of estate is barred, and he now has a ~~right to sue~~ remedy against the debtor. the legal right is in the Ex<sup>r</sup> &c. & the collateral right of the infant cannot prevent the operation of the statute.

But I conceive that the rule cannot extend to suits which are to be brought by the infant in his own name and his own right. as when a promise was made to an infant. here there is no Ex<sup>r</sup> who can sue. if the rule does apply, the saving in the statute is a mere dead letter. 3 P. W. 309.

In what manner infants are to sue & be sued, i.e. by whom are they to appear. - You have examined the rights & duties of infants we are now to inquire how they are to be enforced.

And first how are infants to sue. the rule is that an infant must always sue by his guardian or next friend. the meaning is, that he must appear by his guard<sup>r</sup> &c. throughout the proceedings, else indeed he could not appear at all. for he could not constitute an att<sup>r</sup> to appear for him. as a power of att<sup>r</sup> made by him is strictly void. neither could he plead in propria. because of his want of discretion Palmer 225. 250 Civ. St. 640. 3 B. & C. 148.

If then an infant sues without



guardian or next friend? *deft.* may plead the infancy to the disability or as it is commonly expressed in abet. & *deft.* at the suit 3 Bl. 301. 2 Lamm 212 213 note. Carth 123 1 Inst. 135. b

An infant in person  
*deft.* could appear only by guardian, and could not sue by next friend in any case, indeed the time is unknown to the C.L. By Stat. Stat. 10<sup>th</sup> however, an infant is enabled to sue by his next friend in certain cases of supposition of infancy. Cro. J. 640. Palm. 295. Sta. 709. 2 Bac. 680. Kirk. 209.

This right is entirely by statute being totally unknown to C.L. there are four cases in which it may be exercised. 1<sup>st</sup> When the infant sues his guardian as he may do. 2<sup>d</sup> When the suit is against a stranger and the guardian will not appear in behalf of the infant. Then it is supposed that the guardian stands mute, for if he forbids the suit cannot proceed. 3<sup>d</sup> When the infant has no guardian, 4<sup>th</sup> When in the language of the law he is cloigned from his guardian, that is, is out of his ~~care~~ reach. These are the four cases in which an infant can sue by his next friend, in all others he must sue and appear by guardian. Cro. J. 640. Palm. 295. Sta. 369. Hutton. 92. Cro. Cl. 135. b. note. 2 Bac. 680. That in all other cases he must appear by guardian see 3 Bac. 149. Palm. 296.

There are some opinions according to which an infant may appear either by guardian or next friend in any case, but this does not appear

to be law. for it would be destroying the authority of the guardian & allowing the infant to squander his estate. Cro. Ch. 86. Sutton 92. 1 Inst. 135. b.

If a suit is brought by husband & wife, she being an infant, she need not appear by guardian, the husband being sui juris can appoint an att. for both. 2 Saunders. 213 3 Bac. 150.

When an infant sues by guardian, the latter is liable for the costs & may be compelled to give security for them beforehand, and the same rule holds when he sues by next friend. 1 Eq. Ca. 72. Otho. 506. 1026. 1 T. Rep. 291. 1 Wils. 130. 1 Mchally 60. Phil. 40.

This rule I suppose is founded in a twofold reason, the protection of the infants estate, for the guardian can bring as many suits as he pleases and the infant cannot prevent, and thus his estate might be wasted in groundless suits. again, if the guardian were not liable he might make use of the infants name to vex and harass strangers & perhaps the costs must be paid. The guardian is also liable to an attachment on non payment of costs recovered. it. anc. Gil. Ev. 87.

According to some opinion the infant is also liable for costs & the debt if he recovers may proceed against either for them at his election. 2 P. Wm. 298. Gil. Ev. 87.

This however does not appear to be law, the case in P. Wm. is the only one where it has been decided that an infant is liable for



costs. But upon a rehearing of that case before Lord  
Cham<sup>berlain</sup> King he denied the rule and said there was no  
case in which a Def<sup>t</sup> can recover costs against an inf<sup>t</sup>  
procured by Ex<sup>t</sup> against him. & states the rule to be settled  
viz. That an infant is not liable in Law or Eq<sup>y</sup> to Def<sup>t</sup>  
for costs. *Str.* 708. *Cre. Eq.* 33. 1 *Butt.* 109. 8 *Co.* 61. 2 *Eq.*  
*Ca.* 238 *Mit. Pl.* 26. 1 *Wils.* 130. 2 *Sha.* 1217.

But what  
then it may be asked is to be done? are all the rights of  
the infant to be enforced at the expense of the guardian?  
The rule is that Def<sup>t</sup> is to go to the guardian who is first  
to pay the costs. and the question whether the infants  
estate is liable to him. is referred to the settlement of  
the guardians accounts before the proper Tribunal  
Ch<sup>of</sup> or courts of probate in C<sup>t</sup> when the guardian will  
be allowed the costs if he appears to have conducted prop-  
erly.

The infant Def<sup>t</sup> is clearly liable for costs as much so  
as an adult. In being supposed personally in fault  
where judg<sup>t</sup> is given against him. otherwise no such  
recovery could be supposed? and if the guardian were  
subjected he might never appear and the infant <sup>not</sup> being  
represented would be without protection. *Seyr* 104. 1 *Butt.*  
89. *Sha.* 1217.

Espinasse lays down a rule contrary to  
this but there is no authority cited to support it neither  
does what he says appear to me to be law. *Esp. Dig.* 164

By the Eng. practice both guardians & next friend  
must be admitted by the court or writ out of Ch<sup>of</sup>.

This is required out of precaution to guard against any injury that might arise from the acts of an improper guardian or next friend 1 Stra 304. 709. 2 D. & Ry. 232. Palm. 225. 250. Carth 256. 3 ettk. 603

In Ct. when the suit is brought by a guardian the court never enquire into his qualifications at all, confiding in the court of probate who appoints guardians and especially as that court can remove them at any time. And as to suits brought by next friend the rule is that he must be admitted by the court and an entry made upon the record. But it was said that a tacit admission without entry was sufficient and the rule not being adhered to our practice has been very loose on this point. Kirk. 410. 419.

Any person it is said may bring a bill in behalf of an infant the infants consent being immaterial. it is at his peril however for if the action is groundless the next friend bears the loss. He may be dismissed by the court & another appointed to enquire whether it is expedient to proceed in the suit. The amount of the rule then seems to be that any one may commence a suit as next friend. 2 Bac. 680. 3 ib. 149. 151. 1 Eq. Ca. 72. 1 Bl. 264. Kirk. 411

Of an infant & an adult are co-executors, in an action brought by them in that capacity both may appear by att. the adult having power to appoint one for both. besides the suit is in the right of another, and the infants interest not affected. Cro. Eliz. 278. 541. Carth. 123. 2 Lound. 212. 213



1 Vent. 102. Stra. 784. 2<sup>d</sup> Ray. 600. 4432.

But if an infant & adult are sued as co. executors, the infant must appear by guardian for the proceedings as to them is as in inuitos. They do not join voluntarily in the suit. It may be too that they are not co-executors, there being no room to imply an admission on their part that they are ~~as~~ there is when they are Plffs.

It has been said & so decided that when an infant is sole Ex<sup>r</sup>. he may sue alone & appear by Att<sup>y</sup> because his interest is not affected since he has no costs. Cro. Eliz. 542. 3 Bac. 150. This however has since been determined not to be law. Cro. J<sup>st</sup>. 441. 1 Roll. 287. 1 Vent. 102. 3 Baith. 123. 2 Saund. 112. 113  
test & notes.

ant. 245.

1 Black. 26. 5 B<sup>th</sup>. 4127  
3 Edw. 76. 5 Dougl. 163

Now is an infant to be sued. as to this the C. L. remains unsettled & the rule is that an infant defendant must always appear by guardian, for the stat. West. 122. do not extend to actions, but against infants, but only to those which are brought by infants or in their favour. the plea then must always be signed by guardian & not by next friend or Att<sup>y</sup> <sup>or next friend</sup>. Palm. 225. 250. Cro. J<sup>st</sup>. 640. Nutt. 92. Cro. Eliz. 131. Not. 265

And so far is this rule carried, that in an action brought against husband & wife, altho the husband is seen juris. yet if the wife is an infant she must appear by guardian, for the husband can neither plead for her, nor appoint an Att<sup>y</sup> for both. The husband is always considered as the next friend of the wife but an inf<sup>t</sup>.

Def<sup>t</sup>. can never appear by next friend 1 Roll 288.  
1 Vent. 185. 2 Lev. 38. 2 Wils. 878

But when husband & wife  
are def<sup>t</sup>. both being of age. the husband may appoint  
an attorney for him that is for both. for no rule requires  
that the wife shall appear by guardian as a wife.  
1 Vent. 185.

If an infant having no guardian is sued  
the court must appoint one pro u n a t a. who is called  
a guardian ad litem. this rule is founded in necessity  
for the infant could not appear without guardian.  
And any court with power to try actions against an  
infant has also power to appoint a guardian  
when there is no gen<sup>l</sup>. guardian 5 Co. 53. b. 11th 369.  
3 Bl. 427. 1 Aust. 89. 136. 2 Lev. 136.

But if the infant  
has a general guardian the court cannot appoint  
a special one ad litem. unless the gen<sup>l</sup>. guard<sup>r</sup>. be out  
of the reach of process or has so mismanaged him-  
self that the court is convinced that he is an im-  
proper person to conduct the suit. 1 Sid. 426. 144. 411.  
3 Bac. 150.

As a gen<sup>l</sup>. rule then if an infant has a guar-  
dian. the party suing the infant must summon  
the guardian to appear and defend. the process how-  
ever does not abate merely because he is not summoned  
but the Ct. will give time to summon him in. this  
however is a rule of practice merely.

If an infant def<sup>t</sup>.  
appears by att<sup>r</sup>. who goes against him. the judg<sup>n</sup>.



is erroneous. & a writ of error coram vobis will lie to reverse it. this brings it before the same court who tried the case originally in which there is no impropriety as the reversal is to be founded on a matter of fact not appearing at the first trial & not upon erroneous judgment in law. the writ of error may however be tried by a higher court if that one can try issues of fact Yelv. 58. Cro. J. 640. Hutt. 92. 2 Bac. 218.

The rule is the same if an infant is sued without summons to the guardian & judgment goes against him by default for if a judgment against an infant who appears by attorney is erroneous. as we have just seen a fortiori will it be erroneous when no one appears for him. This rule cannot apply in the Eng. practice unless from some irregularity in the proceedings for judgment on default is never taken there until appearance or entry - the practice of C. is different & the rule here is of consequence. Kirk. 116.

So also if an infant Plaintiff appears by attorney & final judgment is entered for or against him. that judgment by C. is erroneous. There is a distinction taken in Cro. J. <sup>441</sup> viz. that if the judgment be against the infant it is erroneous but if in his favour it is not. and this distinction I think a judicious one. but it is not law the rule of the C. being firmly established that it is erroneous in both cases. Cro. Eliz. 4. 424. 1 Roll. 287. 2 Yarm. 213. note. Carth. 123.

But by stat 21 Jac. 1

it is provided that if judg<sup>t</sup> is included for an infant upon a verdict the other party cannot move it & by 4<sup>th</sup> Ann. of Amend. the rule is the same whether judg<sup>t</sup> is given for an infant Plff or confessor. will direct on non sum information. So that the distinction taken in Cro J<sup>n</sup> 441 seems to be established by Stat. 2 Lamm. 213. notes. 1 Bac. 93.

And so far as my knowledge extends we have adopted the rule established by these two statutes as noticed in Cro. J<sup>n</sup> & indeed it was so determined in Hartford Ct. Feb<sup>y</sup> 2<sup>d</sup> 1817.

It is to be observed however that if an infant Plff appear otherwise than by guardian or next friend the suit may be abated. but after judgment no error lies. it being the effect of the stat. to take away the error and not to alter the C. L. mode of bringing the action. Con. th. 123. 2 Lamm. 213.

If an infant is sued with <sup>except when 64<sup>th</sup></sup> another who is an adult. both appear by Att<sup>r</sup> & neither damages are given against both Def<sup>t</sup>. the whole action is erroneous. not good as to the infant only. but in toto. & both may join in a writ of error to reverse it. The error is total for the judges have no rule whereby to apportion the damages. Cro. J<sup>n</sup> 289. 1 Bac. 776. Carr 367. 3 Ter. Rep. 435. <sup>See next page.</sup>

But if the damages are apportioned so that the judgment seems is erroneous only as to the infant. & he may reverse it as to himself by a writ in his sole name. but it remains good against the other Def<sup>t</sup>. 5 Co. 58. Stra. 180.



1808. 4 Burr. 2022 1 Rob. 747. 776.

In *Constance v. Brown* however it has been determined that if infants and adults are sued together in trespass & all appear by counsel and damages entire are assessed against them, the judgment is erroneous as to the infants only. *Kirby* 116. But this appears to me to be a plain departure from the rule of the Eng. C.L. I suppose the ground taken was that the act of one tortfeasor is the act of all & the act of all the act of each, so that each is liable for the whole damages. But the difficulty *et c.* observed is as to the rule of damages.

If an infant & adults are sued as co-defendants the infant must appear by guardian, for there is no such thing as next friend when the infant is made defendant. (You will remember that when infant & adults are defendants in that capacity the adult can appoint an attorney for both. *Styls* 31 3 Mod. 236 3 Bacc. 157. 3 Saund. 213.)

If an infant and adult join in buying a fine, it will be erroneous as to the infant only & may be reversed as to him but will be good as to the adult. This might seem an exception to the rule above, but it stands on very different ground, for tho' in form a judgment it is in fact a deed by matter of record, and there is no reason why it should not be partially invalid. it is nothing more than a common assumption. & the case is precisely similar to that in which an infant & an adult join in a common

deed of conveyance. Thus an infant & adult tenant in common join in buying a fine, the adult is bound & the infant not, agreeable to the rule of contracts made by infants & adults. Hob. 278. Cro. Ely. 115. 124. 2 Sw. 108. 2 Bac. 229

How far the law regards infants in ventre sa mere.

Such infants are to many purposes considered as in esse. tho not as to all. The modern authorities are much more liberal on this subject than the ancient ones, and thus infants are now considered as in esse for several purposes for which they formerly were not. 1 BL. 130.

The wilful destruction of an infant in ventre sa mere is not murder but a great misdemeanor that is a misdemeanor of the highest kind short of felony 1 Hawk 121. 4 BL. 198. 3 Bac. 665.

But if such a child receives a mortal injury, is born alive and dies within a year & a day after the act done in consequence, it may be murder. that is such infant is the subject of murder. 4 BL. 197. 8 Hawk. 121. 3 Inst. 50. There is indeed an opinion of high authority to the contrary but it is not law. 1 H. P. C. 433.

Such an infant may also inherit from an ancestor unless the birth, the estate descends to the heir presumptive, when it is diverted in favour of the heir at law. Thus a father dies leaving a daughter, the heir presumptive, the title descends to her until the birth of the son of whom the mother is ensuant. So the son is considered as capable



of inheriting before his birth and taken by relation  
back to the time of his father's death for if incapa-  
ble of inheriting at that time he never could take.  
2 Bl. 308. Mot. 3. 1 Co. 95 a. 99 a. 1 P. W. 286. 5 T. R.  
Rep. 60. Doug. 481.

And as the law now is such infant can take  
as devisee. There was formerly a distinction of this kind  
that he could not take by direct devise but could  
by way of E. & C. devise. this however is now done away  
and the infant will take in either way. the estate  
vesting in him by relation from the time of testa-  
tor's death. as if an estate is devised to the unborn  
son of J. S. or to all the sons he may have at the  
time of testator's death. Fearne Con. Rem. 429. 432.  
4 Bur. 2157. 1 Bl. Rep. 643. 2 Wils. 235. 3 ib. 526. 1 P.  
W. 286. 2 ib. 28. 1 Ky. 114. 1 Bro. Cha. 386. 5 T. Rep. 49  
51. 1 Inst. 11<sup>th</sup> m. 4.

The rule is the same as to a legacy or bequest of  
personal property. 1 Bro. Cha. 386. 1 Bl. 130. 1 Bos. &  
Pul. 243.

A question has arisen & incidentally been discussed  
whether under our stat. such an infant might not  
take as grantee by deed the words of the statute  
and "no estate in fee or less than an estate in fee"  
"shall be limited by deed or will to any person unless"  
"in being or to the immediate issue of persons in being"  
I see no room for doubt. the statute was only intended to  
prevent perpetuities & not to confer a power or give an  
effect to deeds unknown to C. L. Stat. Con. 23.

When an

estate is devised to an infant in ventre sa mere, the estate in the mean time descends to the heir at law & on the birth of devisee, the title being divested out of the heir at law, vests in him. the analogy to the former similar rule in case of intestacy being strict. 2 Mod. 9. 1 P. W. 486. 2 ib. 28. 1 Vy. 114. 1 Bos. Cha. 316. 5 T. Rep. 49. 51.

Such an infant takes a share under the stat of distributions. Thus a posthumous child takes equally with the other children. 2 P. W. 446. Barna. 290. 2 Atk. 117.

So too the child may take under a trust created for raising portions for such children as a man has living at his death; the word living notwithstanding. There is generally a great repugnance to dismember an estate among aristocratic families. & this course is adopted to compel the heir to raise portions for the younger children, - thus a trust is created by the father for a certain number of years vested in trustees for raising portions for younger children. and these trustees will hold untill the portions are raised by rents & profits or untill they are paid by the heir. Pre. Cha. 58. 1 P. W. 246 3 L. 2. 2 Hen Bl. 399.

Such a child may also take under a bond given to trustees in trust for such children as the obligor may have 2 Freeman. 223.

And an injunction against waste will be granted in favour of an unborn child. Thus if an estate be devised to him.



and the law determined to get what he can before he is ousted commits waste. and the injunction may be prayed for by any one stating himself the infants next friend. 2 Vern. 710 Pin. Cha. 50. 2 Attk. 117.

A testamentary guardian may be appointed over such child. that is by the father will under Stat 12 Ch. 2. 1 Bl. 130. 562. 466.

An unborn child may be an E. & the he cannot act until 17. & an ad- sur- carter must be appointed. & the consequence of the rule is that if the mother should prove to be insane of more than one. they will be co-executors 5 Co. 29. Off. E. 307. 3 Bae. 123.

And finally if any one devises or bequeaths an interest to such child, as to the unborn child of A. & more than one should be born they will take as joint tenants. 3 Bae. 123.

Relative rights & duties of parent & child.  
In this enquiry it will be necessary to consider the distinction between legitimate & illegitimate children for the rights & duties are different as respects to the two classes.

A legitimate child is defined to be one who is born within lawful wedlock or within a competent time afterwards. 1 Ant. 242. 1 Bl. 446.

The meaning of that is merely however that a child born within the time prescribed is *prima facie* legitimate & that no other can be legiti

mate. The presumption is strong in the favour of a child born within that time but it may be rebutted. *Sta. 940.*

5 Co. 98b. 1 Bl. 267.

An illegitimate child is defined to be one begotten & born out of lawful matrimony, or not begotten nor born during lawful wedlock. 1 Bl. 454.

But this definition I conceive to be incomplete. for suppose after conception the parents intermarry & before the birth, the father dies, the child here is neither begotten nor born during lawful wedlock, still according to the definition of a legitimate child, this one is legitimate. The true definition of an illegitimate child is, one begotten out of lawful wedlock & not born during lawful wedlock nor within a competent time afterwards.

From the definition of a legitimate child, it seems that a child born during lawful wedlock or within a competent time afterwards is presumed to be legitimate, and the presumption is so strong that no evidence was admitted to prove the contrary but such as rendered the legitimacy impossible, and the fact of illegitimacy could be proved only in one of two ways, an impossibility of a coe or impotency. 1 Inst. 244. 2. 5 Co. 98. *Sta. 176. 940. Salk. 123.* 1 Bl. 457.

Under this rule then if a child were born during lawful wedlock or within a competent time afterwards the mere improbability of legitimacy however strong could not be proved.

Originally no other proof of non acco



was admissible but husband's absence beyond the four years that during the whole time of gestation, and if he were within the realm, the illegitimacy of his wife's children could not be proved even although he was confined in a dungeon. 1 Inst. 244. 2 Pa. Reg. 395. Call 142. 483. 1 Hall 358. Carth. 122. 1 Bl. 457.

Answer

if the husband were absent any indefinite length of time & beyond seas when his wife should have a child no matter how soon after his return it would be legitimate. And so if a man, who has returned after an absence of years should be married & have a child born to him within 24 hours after landing, the child would be legitimate, it would

But this rule has been greatly relaxed in and which exploded for now, nonaccip may be proved through the medium of any circumstances that go to establish the fact, and the presence or absence of the husband may be proved in the same manner, as it could be in any other case e.g. at the commission of a crime or trespass. Each case goes to the jury under its special circumstances. So that nonaccip may be proved although the husband was within the realm or even in the same town. 3 P. M. 275. 6. 5 Call. 419. Sha. 925. Esp. Dig. 484.

The fact of impotency may be proved not only by want of age, but by any other fact whatever that conduces to prove it. 1 Bac. 311. Sha. 940. Esp. Dig. 483

Thus far however the rule admits of proof of illegitimacy no otherwise than by what amounts to an apparent impossibility. Lately however the rule have been more relaxed or liberalized & illegitimacy may now be proved not only by want of access or impotency, but by any other fact that evidences to prove it, either direct or circumstantial, as cohabitation by the wife with a stranger, child reputed to be the child of another, called by his name, wife assumed the stranger's name or was called his wife, so that now the rigour of the ancient rule is entirely abolished. Comp. 594. L. 14. 356. Esp. Dig. 454.

You perceive then that as the rule now stands, the illegitimacy of a child born during lawful wedlock may be proved by evidence which goes merely to the improbability of a legitimacy, the actual impossibility not being necessary to be proved.

The issue of a marriage null ab initio is of course illegitimate and if a total divorce is obtained for causes which existed prior to the marriage rendering it unlawful ab initio, the issue is illegitimate for the marriage was wrong at its inception & that time the divorce has relation. 1 Bl. 435. 6. 440. 456. 1 Inst. 235. 1 Bac. 311. 7 Co. 41.

But the legitimacy of a marriage not absolutely void, can be called in question only during the lives of the parties to it. & this is what is meant by the rule that the issue of a marriage cannot be bastardized after the deaths of either of the parties, by proof of the illegitimacy of the marriage except the marriage was



absolutely null. The rule is commonly laid down in such general terms, as to be more often mistaken than understood by this rule. for a child born during lawful wedlock may be found or declared to be illegitimate in a court of justice, as well when the parents are both dead as when they are alive. and when the marriage is absolutely void ab initio, the children may be proved illegitimate as well after as before the death of the parties. for the marriage is voidable by ecclesiastical law after the death of the parties, the separation being pro salute animarum. yet the issue are bastards. 10 Bl. 440.

A child born after a partial divorce a mens et thoro is presumed to be illegitimate for the parents are supposed to obey the decree which orders them to live separate. But children born after a voluntary separation made by husband and wife are presumed legitimate, there being no decree in which to found a presumption of illegitimacy. But in both these cases the presumption may be rebutted the onus of proof however upon different parties in the two cases. Salk 123. 7. Co. 42. Str. 425. 4 T. Rep. 356. 1 Bl. 457.

When the question of legitimacy depends upon that of access, the wife is never admitted to prove by her own testimony, non access. This rule says L. Mansfield is founded in decency & morality & of course in good policy for this consideration will never admit the parties in such cases to prove facts which may in common presumption be proved by other testimony. Still the wife may be admitted to prove her own incontinency because

this cannot in common presumption be otherwise pro-  
ved. Coups. 574. Bull. et. P. 172. 1 Wils. 340 Esp. Dig. 285

But upon a question of legitimacy the mother is a com-  
petent witness to prove the time of the child's birth and  
the marriage as is her husband. Coups. 574.

And in questions of  
this kind, as legitimacy or bastardy, the declarations of the  
father or mother as to the facts whether the child was born  
before or after marriage may be proved by others, after their  
death, so their answers in Oath stating the facts, may then  
be given in evidence. Hearsay evidence is admissible in  
these cases, a witness being allowed to say what is common  
tradition or reputation, so family records, as in family  
bibles, inscriptions on tomb stones, and many kinds of evi-  
dence not admissible in other cases, for this reason, that  
these facts are not provable as others are. Coups. 591. 594.  
Bull. et. P. 233. 294. 5. 7 D. Rep. 3. Peck's Ex. 11 & 12.

By the

Civil & Canon Law which prevails generally in the continent  
a child born before marriage is legitimated by the sub-  
sequent marriage of its parents, but by the C. L. and our  
own the rule is otherwise the child remains illegitimate.  
1 Rob. 624. 6 Co. 65. 1 Bl. 454. 456.

And a child born of a  
widow so long after her husband's death that according  
to the usual course of nature it could not have been be-  
gotten by him, is illegitimate, for such child is not born  
within lawful wedlock nor within a competent time of  
time after 1 Bl. 456. Cro. J. 541.



What this competent time is the law does not precisely ascertain. the periods fixed are different. the best authorities on this subject are medical authors. The distinguished Pro. Anstee has lately introduced a new rule, which alters the time laid down by Coke. But no rule can be precise on this point. for the length of time must depend upon a variety of circumstances, not proper to be particularised in this place. all the learning on this subject is to be found in Har. Co. Lit. 123. b. notes 1 & 2 see also. 1 Bl. 456. 1 Bac. 312. Cro. J. 541. Esp. Dig. 485.

Without therefore attempting to fix the time I will observe that a child born within that usual time computing from the husband's death is *prima facie* legitimate. i.e. the law presumes it so. this presumption however may be rebutted. If a child be born after that time. it is presumed to be illegitimate. this presumption also may be rebutted. the law allows it. tho' it may be impossible in point of fact to rebut it. Palm. q. 1 Roll. 356. 1 Inst. 8. 1 Bl. 456. Cro. J. 541.

If a woman should marry immediately on the death of her husband (which is not to be presumed) and a child is born in such a period that according to the ordinary course of nature it may have been begotten by either husband. the child when arrived at years of discretion may choose which to call father. I suppose however that this would be allowed only in the absence of satisfactory witness. for the estate could not be admitted to decide against clear and satisfactory witness. the books however say nothing of such qualifications to

the rule. 1 Bl. 456. 1 Inst. 8. 1 Bac. 312. 1 Roll. 357.

It is also a maxim of the law that no one can be bastardized after his death it being another maxim of the law that all personal defects die with the person. 7 Co. 44. 1 Inst. 33. 245.

But this rule holds only as between a child born before the intermarriage of its parents & one born after, the first is a bastard the latter not, but after the death of the former the latter cannot question his legitimacy. 1 Lev. 410. Lalk 120. 1 Bac. 315 note. Esp. Dig. 486.

This rule then does not prevent a child being proved illegitimate after his death by impeaching a void or voidable marriage, and the effect of the rule is that if the elder son enters upon his father's estate & his seized his own issue shall hold to the exclusion of his father's legitimate issue. This appears to me to be a positive rule of law. 7 Co. 44. Lalk 268. 1 Inst. 33. a. 245. 1 Bac. 315.

But to exclude the lawful issue in this case there must have been an uninterrupted possession by the elder son & a descent cast upon his issue for if it has been interrupted or if it has not, and the question been made during his life, his issue may be entitled by the lawful issue. 1 Inst. 244.

2 Bl. 6247. 1 Bac. 316

Of the rights & incapacities of illegitimate children.

The rights of these children are in general



such only as they can acquire, for an illegitimate child can inherit nothing. Hence he is called *mullus*, *filius* or *filius populi*. 1 Bl. 458.

But this maxim has been used in a sense far too indefinite. such child has been said to have no kindred but his own issue since kindred is to be traced thro' a common ancestor and a bastard has no ancestor. This is incorrect, for the maxim does not hold to all purposes. Thus a bastard, actual relation is recognised in the law relating to marriage within the prohibited degrees and he will not be allowed to marry any one that he would not be allowed to marry were he legitimate. so it is improper to say he is *mullus*, *filius*. 5 Mod. 168 LaRog. 68. Comb. 365. Com. Rep. 2. 1 Bl. 458.

Included it has been determined under the Eng. Stat. requiring the consent of parents to the marriage of their minor children, that an illegitimate child is included & that if such an one should marry without the consent of the mother or the maintaining parent the marriage would be void. 1 T. Rep. 96. 100.

The extent & incorrect sense in which this maxim has been applied seems to have arisen from first misquoting & then misunderstanding our expression of Littleton. He says that an illegitimate is "*quasi mullus filius* because he cannot inherit to any," i.e. so far forth *quod hoc* he is *mullus*. & the fact is the maxim applies only to the law of inheritance. Lit. Sec. 188. 1 Inst. 123. 1 Bac.

309. 1 Ter. Rep. 101.

The illegitimate child cannot by inheritance acquire a surname as of his father. he may however by reputation & by the name thus acquired he may make purchases, contracts. &c. 1 Inst. 3. 1 Bl. 458. 9.

Under this acquired <sup>surname</sup> I say, he may make purchases conveyances or contracts of any kind? i.e. when of age before that time he has the same capacity with other minors. Pow. Dev. 319. 338. Park. sec. 26. 1 cttk 410. 1 Inst. 3.

He may take too by the name & description of & the son of J. S. provided he has acquired by reputation that name & title. But he does not hold the name for the purpose of maintenance & of inheriting like legitimate children. 1 cttk 410. 6 Co. 65. Pow. Dev. 338. 2 Roll 43. 4.

But he cannot take by description as issue, as if a conveyance were to the issue of J. S. an illegitimate would not be included, for the word "issue" is technical & considered as synonymous with heirs of the body, and a bastard is not heir to any body. 1 Inst. 3. b.

The illegitimate child cannot acquire a surname by reputation except by a lapse of time & common repute. no one can acquire a character in a minute, and a bastard at his birth is not considered as having acquired the reputation of being any one's child. So if a contingent remainder is limited to the eldest son of J. S. whether legitimate or illegitimate, he having no child at the



time an illegitimate child afterwards born to him cannot take for him on two contingencies, the birth of a bastard and acquisition of the name by reputation so as to ascertain the person. — Cro Eliz 510. 6 Co. 65. Co Litt. 123. 127. W. 529. Cow Inst 338. 2. 2 Bl. 172.

It has been said however that such a limitation to the eldest son of a woman may take effect in favour of a subsequent illegitimate child as there is no uncertainty whether the child will get a reputation of being the son of his mother so that there could be no mistake as to the person. 1 Ay. 335. 1 Bacc. 309.

I conceive however that the absence of this contingency will not make good the contingency for the birth itself of an illegitimate is a remote contingency & Blackstone calls it *remota sine a potentia*, and too remote to make to support the limitation, the point however is not settled. 1 Inst. 36. note 2 Bl. 170. 1 P.W. 529.

An illegitimate child can have no heirs but of his own body i.e. no other than lineal heirs, for all other kindred must be traced thro. a common ancestor & a bastard has no ancestor either father or mother. so the son of his mother cannot inherit to him. 1 Inst 36. 1 Bl. 459.

The settlement of such a child in Eng. is regularly in the parish where he was born. this is a consequence of the rule that he is the heir of no one. for in devocative settlement is a species of intestancy any person indeed is presumed

to have a settlement where he is born, but this presumption may be rebutted by proof of the residence of his parents in another place. 1 Bl. 362. 3. 459. Talk 427.

And the mother living in another place keeping her child for nurture; as until of a certain age (as seven) she must do: if the child becomes a pauper the parish in which it was born must maintain it, except so far as provision is otherwise made. Doug. 7.

When however a fraud is practised or attempted to be practised, in order to settle an illegitimate child, as where the mother is sent by the officers of one parish for the very purpose of imposing the child upon another, that fraud cannot be carried into effect. Talk. 121. 1 Bl. 459.

It seems to be taken for granted in cont. that the settlement of the mother is the settlement of the child. & has been so decided as being the more reasonable rule upon the whole. 1 Root. 155. 1 Swift. 169. But such a child can never inherit here any more than in Eng.

### The duty of Parents to their illegitimate children.

This consists chiefly in their obligations to maintain them and the mode of enforcing that duty is prescribed by statute. 1 Bl. 457. 8. 1 Bac. 317.

The law in Eng on this subject is regulated by three or four different statutes. Laws of this kind however are merely local



and each state has probably peculiar regulations of its own. The principle features of the Eng. statute are adopted into that of Connecticut, the many of the minor provisions are not. In Con. & Eng. the father & mother are both chargeable with the maintenance of illegitimate children. 1 Bl. 458. H. Con. 99. 100.

I shall notice the outlines of the manner adopted in Con. of enforcing this duty. how far it may differ from that of other states I know not. A complaint is to be made by the mother of the child to a magistrate under oath upon this he issues a warrant to apprehend the person charged. 1 Swift. 211.

The province of the magistrate is to ascertain whether the party ought to be helden to trial at the next county court in the county where the child is born by a recognizance. - or to discharge him. the county court has exclusive jurisdiction in these cases. Kerb. 267. The mother is allowed to testify both at the inquiry before the magistrate & before the county court. Stat. Con. 54. 1 Swift. 209.

The process issued by the magistrate is a capias, a forthwith, and is criminal altho the object of it is civil.

It was once supposed that the complaint must be made before delivery but that is now overruled. 1 Swift. 210. 11.

The mother's oath is admitted & receipted, and the not conclusive. it throws the onus upon Def<sup>t</sup>. He is not admitted to testify & his denial can be made only by plea. the mother's oath is

sufficient unless it is impracticable, and he is admitted to contradict or invalidate it as in any other case, 1 Sw. 209. 10

It is a prudent & provident provision in our state. that the mother be put to the discovery of the truth at the time of travail. for at this time dissimulation & falsehood is to be left expected. and this process is indispensable on acct. of the tremendous advantage the mother has. the accused not being allowed his oath. indeed the omission of it is fatal and nothing can supply it. Stat. Con 54. 1 Rost. 107. 1 Swift. 209. 10. 1 Day. 278.

When the town prosecutes for its own security it is not indispensable that she make this discovery at this time. for they have no means of enforcing it. 1 Day. 278

The statute requires also that she continue constant in her accusation of the person accused, and this like the other requisites must appear alleged in the complaint. by being constant i.e. means that she do not contradict herself or accuse diff<sup>t</sup> persons at different times.

If Def<sup>t</sup> is found to be the putative father or as we commonly say guilty the jury is that he find security to pay the damages of the infant, and if required give security to save the town from any expense in support of the child. or that he stand committed. This is denominated an order of filiation. & is different from other judgments. St. Con. 54. 5 T. Rep. 372.

This form has been revised so that E. 4<sup>th</sup> are inserted greatly as revised by the court. 1 Can Rep. 417.



But no security of this kind is required of the mother indeed I have never known of any proceedings against her tho. they seem contemplated by the statute.

The damages in these cases are not fixed, but are left to the discretion of the court, to be ascertained according to the circumstances of the parents & the child. The practice has been to assess such sums pay all quarterly or will with the mother and support the child until four years old, and sometimes longer, but never less, together with the expenses of the birth. *Kimb. 268. 1 Con. Rep. 416.*

If the child dies before the expiration of the period that the damages are intended to cover, as when there is so much allowed per week, the remaining £4<sup>00</sup> are paid. And on the other hand if the expenses are found greatly to exceed the sum assessed, it may be increased by application to the county court, & the increase is inserted in the remaining £4<sup>00</sup>.

If the child is not born before the end of that term of the court, the case is continued of course and a renewal of the bond ordered. *H. Con. 54.*

In case of an abortion, the woman dies, or remains before the birth the Def<sup>t</sup>. is discharged. *1 Bl. 458. 1 Sw. 311.*

If the mother does not prosecute as she may, the select men in C<sup>t</sup>. & the overseers of the poor in England in behalf of the town or parish to serve them from expense in the child's maintenance.

If Def<sup>t</sup> is committed

on the E. & he is not admitted to the poor prisoners & the proceeding being so far criminal. H. Con 55.

and if the mother does commence a prosecution & fails to proceed the town to prevent collusion may go on with the same complaint or prefer a new one. ib. Stat.

What the mother has sworn before the magistrates in her examination is good evidence after her death to convict the Def<sup>t</sup> or support an order of filiation 5 T. R. Rep. 373. Nibb. 259.

It was made a question whether in a prosecution by strict law. the mother could be compelled to testify & decided that she could. Vin Salisbury v Davis the woman was compelled by imprisonment. 1 Day. 278. 1 Swift. 211. 12.

It has been made a question whether the mother when testifying on her own complaint. is to answer questions as to her own incontinence with others than the accused about the time the child was begotten. the general rule of law being that no witness is to disparage himself. it was decided that she was compellable to this on acct<sup>n</sup> of her other great advantages.

The trial by Cor. Stat is to be by the court & not jury. it originally was by the court then by jury but now determined to be by C<sup>t</sup> by construction of the stat. the proceeding indeed is precisely like that of the Ct. of sessions in Eng. which has no jury.

Altho. in point of form the proceed is criminal. yet depositions are admissible.



evidence, tho in criminal prosecutions they are not the reason is that the object of this is merely civil. 1 Swift. 211.

The prosecution is criminal again in this, that no appeal is allowed. this was the original rule. it was once altered & then again restored. This process is indeed an anomaly.

Of the rights & duties of parents in relation to their legitimate children. & the duties of those children to their parents.

The duty of parents to their children consists principally in three particulars. maintenance, protection & education. 1 Bl. 446.

The duty of maintenance is founded in natural law. & is enforced by the municipal, it consists in providing necessaries and by the law of Eng. & our own country this duty is reciprocal under certain restrictions or qualifications 1 Bl. 443. 446. Rev. 500.

The obligation of parents to support their infant or minor is absolute & unconditional except so far as provision is made by state to provide for poor children. tho C & L making no provision for other support for children unable to support themselves and a man is bound to provide necessaries for his children whether he is able to pay for them or not. the statute law however makes provision for assistance to be furnished by the town or parish. parents however in all cases first

liable. 1 Bl. 447. 1 Bos. Cha. 268. 387. 1 Ky. 160. 3 e. t. t. k. 399  
3 Day. 37.

This duty is enforced in Eng. by stat. 43 Eliz. & by a similar statute of our own. 1 Bl. 448. H. Con. 232. The obligation of maintenance under these statutes extends as well to grandparents as to parents, and the liability does not cease with infancy. the statutes provide, that able poor & impotent persons who are unable to support themselves, either from want of understanding or from infirmity, shall be supported by their parents & grand parents if of sufficient ability. So the statute under the C. L. leaving the duty conditional. 1 Bl. 448. Stat. 190. H. C. 232. 3

Parents are not then bound to support their adult children, if such are able by their labour or otherwise to support themselves. But infants & minors are considered by the law as unable to support themselves, and the duty of parents to support them is unconditional & extends so far as the stat. gives aid from the town or parish. 1 Bl. 449.

On the other hand the same obligation under our stat. rests upon the child & grand child to support such of their parents or grand parents as are unable to support themselves, provided always that the children are of ability sufficient, and if they are not the town or parish is liable. By the Eng. stat. children are under the same obligation, but the statute does not extend to grand children. Stat. 190. 2 Buls. 345. Sty. 283. 1 Bl. 454. H. Con. 232. 3.

When then



are no relatives standing in the relation of parents or grand parents children or grand children, the obligation descends upon the law in Con. & the parish in Eng. where the pauper is settled. this obligation you will observe is secondary that of relatives primary. Stat. con. 242. 3. it enacts.

Again the obligation in the first place descends upon those who are nearest in relation, as parents would be liable before grandparents, & children before grand children. we have no collection of rules upon this subject. this however I take to be the law according to principle thus suppose a pauper parents able to furnish part of his necessary support & grand parents affluent. I take it that the parents are to furnish what they can and the grand parents to make up the residue. and the rule would be the same as it regards children & grand children.

It seems to be the prevailing opinion in Con. that if a man marries a woman already having children by a former husband, that he is bound to support them during their minority and that he in return is entitled to their services. we have no case in point. tho this is common practice. My own opinion is that he is not bound, & this is the Eng. rule. 1 Root 250. 361. Kirk 156.

In Eng it is settled that a second husband is not bound to support the wife's children by a former marriage, even during coverture, and this rule appears settled without reference to the question.

whether the mother was at the time of the second marriage able to support them or not. 2 R Ray 1454. 4 T. Rep. 119. 2 Bull. 346. 3 Esp. 1. 1 Sha. 190. 955. 1 Bio. Cha. 268. 2 Vent. 353.

The rule in Eng is with ref. to what is called the true construction of the stat. 43 Eliz. the words parents &c. there used referring to natural relations by consanguinity and not affinity. The wording of our statute is precisely like that of Eliz. and the construction of both it would seem should be alike. It has been determined in Eng. that the maintenance advanced for minor children (of the wife by a former husband) by the second is a good consideration to support a promise made by such child after full age to repay the sum expended. 4 East. 76. 1 Selw. 297.

Clear it not for the weight of authorities. I should doubt whether either, the Eng. or our rule were correct in its application to this particular case. It appears to me that the true criterion of the husband's liability in such. is, whether the mother at the time of the second marriage was of ability to support such children, if she were she is absolutely bound to support them, and as the husband took her care over. I should suppose him bound, on C.D. principles, to support them. Besides the stat expressly makes it his duty to support them until the second marriage entirely, and as his power of discharging that duty afterwards is destroyed by the husband's knowledge, he ought to be



bound to support them. *W. S. Blackstone* lays this down  
for law and does not notice that the authorities are  
expressly against it. Our statute would rather make  
him liable in every event whether the mother was  
able to support them or not. But I apprehend  
the rule ought to be, that if the mother were at the  
time of the second marriage of ability to support the  
children, the husband is bound to do it, otherwise not.  
1 Bl. 448. *Stylis* 282.

It is also settled <sup>by the law</sup> that a man is  
not bound to support his wife's parents altho they are  
poor. Now there is a manifest difference between  
the expediency & policy of this rule and the one just  
mentioned. In the former case the husband knows  
the situation of the children the amount of the bur-  
den that he assumes & may reasonably expect that  
it will soon be discharged? in this case he is  
taken by surprise the poverty being superveni-  
ent and the burden likely to increase. & thus do-  
mestic peace be endangered? Thus I should suppose  
suff. reasons for the distinction — And yet in the  
strict principles of Eq<sup>y</sup>. I should suppose the prop-  
erty ought to be bound if she had any at the  
time of her marriage. *Chas.* 190. 2 B. & A. 435.  
1 Root. 250. 361. *Kent* 155.

There is a supposable case not  
settled by decisions to which I will advert, as when a  
person has both parents & children able to support  
him. The question is the reciprocal duty of parents &  
children to support each other when able, and I know

of no principle by which we can determine which are first liable in the case supposed. I should think the burden ought to be divided between them. it is more a matter of opinion however.

But the parents who are of ability are bound to support their children who are not able to support themselves. this does not prevent a parent from disinheriting his children or any one of them by testament, for this duty as it arises out of the relation can continue no longer than the relation continues. 1 Bl. 449. 50.

If a man dies without issue, leaving a widow who is unable to support herself, and having no relations who are bound to do it, by the stat of Con. the husband's estate in the hands of his legatee, his he is liable for her support during widowhood. this I believe is peculiar to Con. The reason of the provision probably is, that her right supersedes that of all but kindred heirs. H. Con. 382.

### Of the mode of enforcing this duty

In Con. this duty is enforced against children and the parents of adult children by an application in the form of a memorial to the county court. I say parents of adult children because by the C. of this duty to support their minor children is absolute, & they may be sued at C. L. to perform it. But the duty to support an adult child is conditional as to their own ability and that of the child so that no action will lie as there is nothing to charge them with in the shape of a debt. 1 West 60. 2 id 168



But for necessities furnished to minor children an act at law lies against the parent, whether of ability to pay or not. for the duty is unconditional & strictly a debt. 3 Day. 37 3 Esp. 1 251.

This application for the maintenance of adult children may be made by any of the relations of the pauper who are within the state, as children grand children &c. or by the select men of the Town. the state does not provide that the pauper himself may apply. H. Con. 382.

On this memorial all the parties concerned male & female are cited to appear before the court & the expense of the pauper necessary maintenance is apportioned among them in proportion to their ability. and no reference is ever had to the amount each has received from the family estate or from the pauper himself. those who have received least & sometimes nothing often pay the most. These proceedings are in the nature of the proceedings at the Dispositions. These relations are then required to give security to perform the order then made as to pay the sum specified as per week. & if no security is given, the court orders execution to issue quarterly. - The payments are to be made to some individual or trustee to be employed for the support of the pauper. Stat. Con 383.

The duty of protection is recognized by the Munn. law and its execution is left to the dictates of natural law. indeed it is rather permitted by the Munn. law than required coercive provisions never being

supposed necessary. 1 Bl. 450. — a parent under this principle may maintain or uphold his child in lawsuits without incurring the legal guilt of maintenance. So he may justify a battery in defence of his child, not that he may merely interfere to prevent harm as he may between strangers, but he may consider himself as attacked and his act an looker upon precisely as if done in self defence. 2 Inst. 564 1 Bl. 450. Cro. J. 296. 1 Hawk 83. 131.

And I will here observe that this duty or rather right of protection is reciprocal between parent & child in both the cases above instanced of maintaining in law suits & defence. 1 Bl. 454.

It is also a clear rule of the Man. Law that parents are bound to give their children according to their ability a suitable education. This is a duty difficult for the Municipal law to enforce and it is left generally as it safely may be to the feelings of parents. No other provision is made by the Eng. law, than that poor children may be bound out as apprentices, and that parents shall not send their children abroad to be educated in the popish religion. 1 Bl. 426. 451.

We have in Const. an antient stat. which is practically neglected and probably of course or injury, providing that parents shall under pain of a fine, teach their children to read the Eng. tongue well & to understand the laws inflicting capital punishment. If unable to do thus much, to teach them some short orthodox catechism. It also authorizes the school



now to take children from parents who neglect to educate them and place them under or bind them out, under title 21. & from title 18. to some master to instruct govern & employ them. & this authority is often exercised. 4. Con. 60.

The only duty of children toward their parents. & at the law enforced, is that of obedience and maintenance when in need according to the rules above laid down. 1 Bl. 453.4.

As to the rights & power of parents over their children. it is a rule that a parent has right to correct his minor children in a reasonable manner and for a reasonable cause. This right arises out of his duty to maintain protect & educate them. which he could not discharge without it. the right of governing being indispensable. 1 Hawk. 130. 1 Bl. 452.

And there is no doubt that a parent may in some cases be subjected to an action at the suit of his child by his neglect or abuse.

It is not to be understood that this right is unlimited. he has no more right to kill or to beat his child outrageously than any other person has. that he is never subjected for slightly stepping over the limits prescribed by the law. the power being discretionary. the law will not charge a parent for an error of judgment as to the desert of his child. To subject the parent the punishment must have been both unreasonable & malicious. that is wanton & unreasonable in degree. 1 Hawk. 73.4. Kingdome 65.

This power of correction the father

may delegate. for every father has a right to bind his minor children as apprentices to masters, and as he can constitute that relation, he can confer the power of correction. the master is placed in loco parentis, and this right is as necessary and indispensable to the master as the father. the father has indeed only what power is necessary & can confer no other 1 Bl. 453.

The parent has also a right to control his minor children in a contract of marriage. the consent of the parent where there is one is required by the Eng law & our own, and without this consent by the Eng law the marriage is utterly void & the issue of course illegitimate (see Husband & wife) By our law, the consent is required still the marriage is good without it, but the person solemnizing it is liable to punishment H. Con. 286.

A parent has no power over his infant child's estate otherwise than as trustee or guardian & in that capacity. he is held to account for the profits & the property when the child attains full age and perhaps sooner for the proper court may call him to an acc<sup>t</sup> at any time 1 Bl. 452. 453. see part of different kinds of guardians.

And a minor child is entitled to all the property he can acquire otherwise than by service, for the avails of his labour belong to the father and he may sustain an acc<sup>t</sup> for them, but as to such as the infant acquires by gift grant devise &c. the father has no more right to it than any other person. he may take charge of it, being regularly the infant's overseer or guardian, but he must account for his



is a mere naked authority & he has no manner of interest in the property whatever. The principle upon which the father is entitled to the services of the child is, that the child is considered as the servant of the father, except in the case of emancipation (which see post) 1 Bl. 453. 1 Co. 290.

And upon this principle that he is entitled to the services of the child's labour it is that he can maintain an action per quod servitium amittit. for the beating or otherwise injuring the child, so as to occasion a loss of service the fact is that the father recovers in the capacity of master although the relation arises out of that of parent & child. 9 Co 119. Esp. Dig. 645. 1 Bl. 453.

He can also sue for a parent's action for enticing away his child, being a minor for this is taking him from his services. Peake's Ca. 233. See also 1 Co. 290. I would however <sup>observe</sup> that if the child is personally injured, he is entitled to sue solely to an action to recover damages for the immediate personal injury, it is not in judgment of law an immediate injury to the parent his injury is consequential. Cro. Eliz. 55. Esp. Dig. 646.

And if <sup>as</sup> consequence of any such personal injury to a minor child, the parent has incurred any actual expense as for the curing of any corporal hurt he may recover it, if he alleges it specially as a ground of damage, but if the action is laid with a per quod servitium amittit merely without alleging the special damage he cannot recover. 3 Wils. 18. 1 T. Rep. 259.

Upon this same principle again, an action in favour of the father lies against any one who has seduced his daughter

land with a *per quod servitium*. In this case as in the former one loss of service is the gist of the action. Attempt has been made to liberalize the practice and enable the parent to recover without alleging even the common nominal loss of service. But that originally was and still remains the nominal ground of action. *2d Ray 1032. 3 Bur. 1879. 2 T. Rep. 168. Cro. Ely. 769. 11 East. 24.*

And in this action the parent may also recover the damages incurred by his daughter's illness, provided he alleges is specially as before, but not without, for he must give notice of all the grounds upon which he claims special damages. *Ray. 259. 3 Wils. 18.*

But altho loss of service is the nominal ground of action it is not the real or principal ground of damage. This consists in the disgrace to the parent in regard to the family, and the injury to the character & affection of the family, and yet these are not by se. sufficiently definite in their nature to ground the action yet they aggravate the damages & sometimes enormously. *3 Wils. 19. Laws 67. 8. 11 East. 23. Esp. Dig. 625. 2 Feb. 187.*

For a hint of the position that the loss of service is only the nominal & not the real ground of action a rule of damages, evidence of the slightest service performed by the child is sufficient to ground the action & it is not necessary that the damages be in any measure proportionate to the actual loss of service. *3 Wils. 19. 2 T. Rep. 168.*

Another action will lie in a pecuniary point of view the child may have been a burden to the parent, and



this action nominal for loss of service lies as well for the seduction of the daughter of the highest nobleman in Eng. as of a labourer. and the amount of damages is in a great degree apportioned to the rank of the family injured. the in point of fact the loss is generally much less in families of rank. Peck. Ca. 55. 1 T. R. 11.

Includ the character of the daughter herself determines in a great measure the amount of damages, hence any witness which goes to impeach her character goes in mitigation of damages. and yet this can have no bearing upon the amount of damages the father may have sustained by loss of service. Peck. Ca. 39. 240 Bull. et. P. 27. 1 Post. 472

But as the parent is in this case the party recovering. any misconduct of the parent in relation to the intercourse or intimacy of the parties concerned in the transaction goes in mitigation of damages. ib. ante.

I have observed to you that the action would not lie unless the daughter has been in some way the serv<sup>t</sup> of the diff. this is clear from the old authorities. but Ld. Abington says that she need be proved to have actually laboured in his service. I have observed that any the least service will be sufficient. and if the daughter were a minor it is enough to have lived in the father's family as a subordinate member of it. This I take to be correct, for she is deemed a serv<sup>t</sup> subject to his command, so it is not necessary to prove a single act of service if she were a minor in the family. this constituting a servant

of course. Peck v. Ca. 55. 233.

It is further to be observed on the subject that the age of the daughter is not material and if she is of full age the action will lie, if at the time of the injury done she lives with her father subject to his domestic government & control, and there are no offerings, any contract of service, the child is not of course emancipated nor is the relation disposed by her coming of age. If she continues with her father or maintaining parent as before she has done, she is considered as a servant de facto.

3 Wils. 18. 2 D. Rep. 166. 6 ib. 252. (as to emancipation) 1 East 526  
2 ib. 276.

But if the daughter were under age at the time of the injury done, she is considered as the servant of the parent of course unless she were serving another without any wages or receiving them for herself in that case she would not be in the service of the father.

It is said in Esp. Dig. that the daughter must have been actually resident in the father's family at the time of the injury committed, but the authority quoted does not support the position. Suppose the minor daughter is in the service of another & the father receiving the avails of her labors or she is at a boarding school, the father has not abandoned all rights to her services, for if she is under age she is considered of course as owing to him until it appears that she is actually emancipated or is in the service of another whose claims exclude those of the father. Esp. Dig. 668  
5 East. 25. 2 Selw. 1084.

It is 1<sup>st</sup> again by Esp. to have been



laid down by L<sup>d</sup>. Mansfield that to support this act<sup>n</sup> the daughter must have been a minor. but this is a gross mistake. there are cases where the daughters were 22. 25. 30 & upwards. The act<sup>n</sup> was originally indeed bro<sup>t</sup> for injury done to minors. but when the principle of it became understood, the age of the sufferer made no odds. Esp. Dig. 645 & quotes. Bur. 1878.

This action may be bro<sup>t</sup> not only by the father but after his death by any one standing in loco parentis, mother &c. There is such a thing known in the law as adopting children which is shown by declarations and acts consistent therewith and persons thus adopting children are considered as parents for every purpose as to bringing actions. the relation being de facto that of parent & child. that of master & servant follows of course. There are cases where an action was allowed to sustain an action for the seduction of an adopted child, and this is allowed altho the parent is living. 25 Rep. 4. Vacker Co. 55.

In these cases the daughter herself is a competent witness & this rule is not founded upon supposed necessity but upon the good ground of her not being interested in the result of the suit. 3 Wils. 18. 1 Root 472.

In an action for seduction merely, & not with loss of service, the ground of action sounds in case but doubt that ought to be the form of the action and yet the Eng. practice is to declare in trespass. In Ct. however the established form is case and that is the correct form, for if a servant is injured by battery, he has an act<sup>n</sup> of trespass but the measure in-

may bring consequent to his remedy is in case the Eng.  
 practice is established by precedent against principle  
 1 T. Rep. 167. 2 L<sup>d</sup> Ray. 1032. 1117. 5 T. Rep. 361. 2 etw Rep. 482  
 6 East 388. <sup>1293</sup> — that the Eng. prac. is true. 3 Wils. 18. 3 Bur. 1878  
 2 T. Rep. 4. Peakes Ca. 233. 240. 2 et. Rep. 476.

But when the  
 action is laid with an illegal entry of D<sup>ffs</sup> house & the  
 subsequent wrong to the daughter under a her good, the  
 action is trespass both in form & substance & the adve-  
 tion is more matter of aggravation. 2 T. Rep. 167. 8. L<sup>d</sup>  
 Ray. 1032. Salk. 206. 642. 3 T. Rep. 292. 1 A. Bl. 555.

In this  
 case the action is in form and substance trespass, the gist of it  
 being the entry, and the subsequent injury is a conse-  
 quence of the wrong being a more ground of aggravation  
 or consequential damage. it is true.

But when the action  
 is thus brought a license to enter the house, or by being  
 bidden to walk in, defeats the whole action for the entry  
 is the ground of action, the rest is more aggravation, any  
 defence then which answers the alleged cause of action de-  
 feats the whole for what covers, the gist extends to all  
 matters of agg<sup>n</sup>. This form of act<sup>n</sup> then is a dangerous one  
 and there is no particular benefit to be derived from it the  
 damages are not increased, the action is more easily de-  
 feated and the Def<sup>t</sup> harder to be proved. 2 T. Rep. 166.

The Swift system it is insisted that a license to enter is no  
 defence to such an action for the subsequent unlawful  
 conduct of Def<sup>t</sup> makes the whole act a trespass ab initio.



but this is not supported by principle. When the law gives a license as to a ~~shop~~ to enter, and he abuses it, he is considered as a trespasser ab initio by virtue of a tacit condition annexed to the license. but if a license were given by an individual, any subsequent act does not alter the original one. 2 Swift. 64 — Park 191. 8 Co. 146d. Ryder. 96. 7. 2 Bla. Rep. 1218. 5 Bac. 161. 1 T. Rep. 12.

It has been a question on which opinions are much divided, whether a parent can sustain an act for taking away his child without alleging any loss of service or any special damage. I should think on the more liberal opinion that the courts the authorities however are the other way. By the feudal law an action would lie for taking away the heir, because the ancestor was entitled to the value of the marriage, a sum paid him on the marriage of that heir usually by the other party. But with regard to younger children it would not lie without alleging some specific damage. Hawkins says the action would lie for the ancestor has an interest in the education. his child so thinks Blackstone the question appears to me unsettled. 2 Ely. 770. 3 Co. 38. b. 3 Bl. 140. Felt. 90. 260. 3 Bur. 1879. 1880.

The authority of the parents ceases it is said when the child attains the age of 21 for then he is said to be emancipated. this merely means that he has a right to emancipation & an exemption from further parental control. There are but few cases in which children leave their parents at 21 and if a child does not leave but continues as before without any contract of service, he is a servant of course, living thus proves him so de facto. & in such case there is no actual emancipation. It is upon this principle that

the father maintains the action for seducing his daughter over 21. So a child living thus acquires a new settlement with the father. 1 Bl. 453. 6 T. Rep. 352. 1 East 526. 2 ib 276.

The mother as such has no authority whatever over the child. Her authority is derived from the father entirely & he may prohibit her to exercise it. i.e. he is entitled to do it. The mother however is not a wrong doer when exercising domestic government. for she is considered as acting by his implied permission so that practically there is no want of domestic government. you will observe that I am speaking of her rights as mother during coverture according to the strict theory of the law. 1 Bl. 453.

Now far is the parent made liable by the acts of his children. on this subject there are three general rules. 1<sup>st</sup> a parent is liable for the torts of the infant while they remain with him as minors or as servants de facto to the same extent precisely as a master is for the torts of his servant and no farther. for there is no reason why a parent should be subjected in any given case than a master. see Mas. & Dun.

2<sup>d</sup> The father is no otherwise liable for the contracts of his children than master are on those of their servants except in the case of misfeasance furnished; for a master is not of course bound to provide misfeasance for his servants. but a father is for his infants & sometimes for adults. so far forth than he is liable as master. but for misfeasance the father is liable as father. see Mat. & Dun. & ante. Pa. & Ch. Under the Con. Act there is a new rule introduced which is wholly



unknown to the C.L. it is provided that if a minor child is permitted to contract by himself and in his own name, the contract binds the father of course & not the child. precisely with master is bound by such contracts in the same statute. This is a positive rule of law. The C.L. as to children & servants is that they can bind their parents or masters by those contracts which they are either impliedly or expressly authorized to make. H. Con. 293.

By our stat laws parents are obliged to pay the fines inflicted on his children for certain offences, for the parents are supposed to have been able to have prevented the perpetration as for sabbath breaking, military, highwaywork &c but not other punishments than pecuniary can be thus transferred. By C.L. every man & woman & child answers for themselves in criminal matters. H. Con. 318. 347, 379. 228.

### Of the Different Kinds of guardians their rights & duties.

A guardian is sometimes defined to be a temporary parent or one standing in loco parentis for certain purposes, during minority. I say for certain purposes for he is not a parent for every purpose. And a minor child then under the care of a guardian is called a ward. 1 Bl. 463.

In Eng. & in our country the guardian has the care of both the person & estate of the ward by this is meant only, that both the estate & person are under the care of some guardian, for the person may be under the care of one & the estate under that of another 1 Bl. 460.

At C. 4 the kinds of guardians are four, and 1<sup>st</sup> guardian in Chivalry. this took place only when an estate holden by the feudal tenure of knight service vested in an infant by descent. it arose then entirely from the tenure and was vested in the L<sup>d</sup> of the seignory it continued over male until full age & over female until 16. or marriage which we should happen first and extended to person & lands.

This guardian was not accountable for the rents & profits during minority indeed the guardianship was intended merely for the benefit of the guardian. it was a species of property & alienable and there is an instance of its being sold for £100,000. But it is now virtually abolished with the tenure in which it originated by 12 Ch. 1. We now have land holden by other tenures of course this kind of guardianship is unknown to our law. 2 Bl. 77 1 Inst 88. n. 11. 2 Bl. 67. 8.

77. 2<sup>d</sup> Kind of guardian is by nature. this subject is scarcely touched of in the books. Some have considered as confined to the father others to the father & mother only. But the father or mother or any other ancestor may be guardian by nature. the father includes all others then the mother is next preferred among more distant relatives (other claims being equal) priority of prop<sup>ty</sup> of the ward person decides the question 3 Co. 30. a 1 Inst 88 note. 12.

A guardian by nature has no authority except over the person of the ward which continues until the ward is of full age. that is such guardian as a guardian by nature



has no other power. for the same person may be in full power in different capacities. *ib. ante.*

This guardianship extends only to those his apparent & hence it would seem that by C.L. a daughter could never be the subject of a guardianship by nature, for a daughter cannot be his apparent. 3. Co. 38.6. Coitt. 386. 1 Inst. 84. a. 28. b. note. 12

In Con. & I presume throughout the U.S. all one's children are his apparent of course they may all be the subjects of a guardianship by nature. In Eng. the father can supersede all claims to this and any other kind of guardianship by appointing by deed or will or testamentary guardian by virtue of 12 Car. 2. for it was not so at C.L. 1 Inst. 88 b. note. 89. n. 14

In Eng as well as here parents are called the natural guardians of all their children. but as the term is technical the use of it in that sense is incorrect. for no one can be by nature guardian to any one except to his his apparent. by the loose sense in which the term is used it seems to mean only such persons as the law of nature designates as a proper guardian. In some the law appoints no guardian. the C.L. settles the guardianship when the father is a matter of course if necessary & on his death upon the mother if there is no manifest impediment. In our country it is technically correct for the reason above given. 1 Inst. 8 note. 12.

3. The guardian of the third sort at C.L. is called

guardianship in socage. This like the guardianship in chivalry  
arose from the tenure and it takes place only when an  
infant under 14 years is seized of land derived by descent  
holden in socage tenure. 1 Inst. 87. 8. 2 Mol. 176. 1 Bl. 461. 2

Guardianship of this kind belongs to the nearest of the  
parent's relatives to whom the land came by any possibility  
descent. This is intended to guard against any temptation to  
a breach of trust. 1 Bl. 461. 2.

I do not know where this kind of  
guardianship is known in any of the U.S. It extends to  
the person, the socage estate, in corporeal hereditaments &  
it seems to the personal property: generally speaking the  
custody of the person draws after it that of every species  
of property. 1 Inst. 87. 6 & see note 13. 1 Roll. 50. Sutton 17.

But it is not  
assignable like that in chivalry which is intended for the benefit  
of the guardian & is but a trust founded in a capacity. This  
kind on the other hand is intended for the sole benefit of  
the infant, a personal confidence is imposed in the guardian  
& he cannot transfer it at all. 1 Bl. 461. 2 & Plow. 293.

It ceases when  
the infant attains 14 and the ward may then enter himself  
the guardian who must account for all the profits which  
have accrued in the mean time. It is said to cease at  
that time because when of that age the infant may choose  
a guardian. He is not to be without a guardian & the one  
in socage merely gives place to another. 123. 1 Bl.  
161. 2. 2. 3ae. 687.

Such a guardian however may  
now be superseded by a testamentary one by virtue of Stat. Cas.



It is guardian for nurture. this takes place only when there is no other appointed by law. it extends to those children only who are not his apparent. to those persons only and terminates at 14. 1 Bl. 461 3 Co. 38. 1 Inst. 86. n. 12. 89 n. 12

This species of guardianship can be renewed only by father or mother of the ward & is not to be held by any other ancestor or relation so that a child without father or mother cannot be a ward to this kind of guardian. his father can have no guardian for nurture. his father & mother being to have natural guardians. or the father rather which is more extensive, continues longer and is more complete. 20 et seq. 14. 1 Inst. 89 n. 14.

It would seem then that there can be no guardianship for nurture in the last for all a man's children are his heirs apparent.

By 12 Car. 2. a father whether himself of age or not may by deed or will attested by two witnesses appoint a guardian for his children who are infants and under age (for an age is an emancipation) from for such as are unborn. and this appointment may be in proprium or remainder thus to A for life and then to B for life so on as long as his children remain minors. creating a succession to provide against any possible contingency of his children remaining without a guardian of his own selection. This appointment may be made to continue till the infant is 21. or for a limited period short of that as any age under 21. may relate to one child & not to others or

there may be different guardians for different children.  
 This kind of guardianship is called testamentary, it  
 extends to the person & all kinds of property and su-  
 persedes all other guardians. The father receives the  
 authority to appoint by stat. In C. we have no such  
 stat tho there may be in other states. 1 Bl. 462. 1 P.  
 11 m. 403. 2 ib. 110. 2 Wils. 129. 1 Inst. 89 note. 15.

There is an-  
 other species of statute guards in Eng. entirely unknown  
 to us. created by 4 & 5 Ph & Ma. over females only & con-  
 tinues only until 16. 1 Inst 89. n. 14. 2 Bac. 675. There  
 is also a guardian by custom with those we have no  
 probable concern. 1 Inst. 89. n. 15.

But there are several  
 species of guardianship not enumerated by the old C.  
 I mention of these the first is of those who are chosen  
 by the infant himself. this takes place in those ca-  
 ses when the law provides none and none is appointed by  
 the parent for then would exclude his election and  
 altho I have enumerated seven diff. kinds of guards.  
 such a case is supposable & not be improbable. This  
 award without father or mother. holding no land by  
 knightservice. in socage or if he does, over 14. not then  
 apprent. he is then without a guardian. this last  
 species is to provide for such emergencies. it is of late  
 origin being introduced about the time of the resto-  
 ration. 1660. tho it was somewhat known before. 1 Inst.  
 87b. 89. n. 14. 1 Vig. 375.

And yet there does not appear to be any  
 specific mode pointed out by the Eng law in which this elec-



tion is to be made. in common practice it is made before a judge at the circuit who takes some memorandum of it. sometimes it is done by the mere act of the parties as in the case of *L<sup>d</sup> Batten* who appoints a guardian by deed whose acts were recognised. and it is not certain but it may be done by panels. there is no law deciding this point. but I should hardly think that so loose a practice would be sanctioned. 1 Inst. 89. n. 16.

The age for choosing in Eng is 14 for both sexes. in *bon<sup>o</sup>* 14 for males & 12 for females. and this point is not precisely settled in Eng. it is said that an infant has the power before 14 and there is no decision to determine the earliest time. tho the age of 14 is generally considered as the legal age. 1 Inst. 89. n. 16. 1 Bl. 463. 490. 1 Vy. 158

There may be also a guardianship by the appointment of the *L<sup>d</sup> Ch<sup>o</sup>* this is also of modern date. but the *Ch<sup>o</sup>* have now exercised it for upwards of a century *Gil. Eq. Rep.* 172. 1 Brew. *Per. Ca.* 544.

The *Ch<sup>o</sup>* however never exercise this power when the infant is otherwise provided with a suitable guardian. But when a guardian is not provided or but improperly. the power of the *Ch<sup>o</sup>* is very extensive for he may remove a testamentary guardian or even the parent himself & appoint another. 1 Vy. 160. 1 Bl. 463. *Per. Cha* 106. 1 *Wm.* 703. *Ch<sup>o</sup>* 44. *L<sup>d</sup> Ray.* 480. 1596. 2 *Bac.* 679

In *Can.* a court of *Ch<sup>o</sup>* exercising more of these powers. the same sort of power however is vested in our prerogative

or protect courts, and in other states by various courts as their st.  
 direct. It has been said again that a guardian may  
 be appointed by the Ecc. courts & that court has exercised  
 the power of appointing a guardian over the person as well  
 as over the personal property. the first was always & the latter  
 has lately been denied, and that court has no other power of  
 this kind than to appoint a guardian ad litem, or a special  
 guardian. In U.S. there is no ecclesiastical court of ju-  
 dicial power. 2 Bac 679. 3 Wils. 384. 3 Burr. 1496. 3 Atk. 631.  
 1 Inst. 131. 2

And lastly there is a species of guardian called  
 a guardian ad litem. of this I have lately had occasion to  
 speak. called too a special guardian and is appointed when  
 an infant has no genl. guardian, & for a particular suit  
 or number of suits and may be appointed by any court  
 in which an infant is sued. this power is allowed from  
 necessity for ju<sup>d</sup>. could not be conducted without inter-  
 ference or ag<sup>t</sup>. the inf<sup>t</sup>. 3 Bl. 427. 2 Lw. 136. 5 Co. 53. 3 Bac. 680.

This guardian is sometimes appointed in Eng by the crown  
 i.e. by the Ch<sup>l</sup>. in the place of the King, and guardian  
 genl. ad litem have been so appointed but this is  
 not now practised. 1 Inst 87. m. 16

I do not know how many  
 kinds of guardianships exist in U.S. but I presume they  
 are genl. very like those of Eng. There certainly can be no gua-  
 rianship in chivalry or socage for these terms were never  
 known in U.S. custom cannot make one. In Conn. too  
 we can have no testamentary guardian for that is un-  
 known to C. L. & we have no stat. neither have we any



appointed by Ch<sup>m</sup> tho this kind may be known in those states where they have Chanc<sup>y</sup> and in other states too they may be testamentary guardians by stat. but some of these kinds of guardians are unknown in Con. & five of them in all the states.

There are three kinds of guardians known in Con. 1<sup>st</sup> natural guardians or guardians by nature. 2<sup>d</sup> such as are appointed by the court of probate & 3<sup>d</sup> Guardians ad litem. Guardians for mother cannot exist here for it extends only to those children not hers apparent but all children are hers apparent in U.S. The rule that an infant must reside with his mother until seven does not make her guardian she is only nurse. In fact the father is natural guardian to all his children all being hers apparent. this continues until 21. extends to all the children & as well to their property as their persons. on his death the mother generally acts as guardian but she is not strictly a guardian de jure. for another may be appointed over her male children during her life without removing her. this rule is founded in the philosophy of the state. H. Con. 373.

But with respect to female children it has been determined that the mother is their natural guardian until of age to elect one. but our stat makes no distinction & I cannot conceive when this construction came from. 1 Root 131. 2 Root 320.

But during the life of the father another cannot be appointed without removing him & that can only be done on special reasons showing his disqualification. for he is not to be re-

moved as a matter of course. *Stat. Con. 373.*

The mother then does not appear as the natural guardian of her male children of any age: and the court may appoint another of course without removing her. Besides, the court after giving her the appointment which shows she is not entitled to it de jure, *1 Root. 131. 2.*

Our stat. provides that if there be no parent guardian or master, the court of probate of the district shall appoint a guardian to a minor. If he is of legal age to choose, the court summons him in to make his election to which the court keeps some regard but is not bound by it. for he may appoint a totally different person. *Stat. Con. 373.*

And if the minor neglects to appear or appears & does not choose for himself the court appoints a guardian at discretion. *ib. st.*

If the minor be a male under the legal age of choosing a guardian the court may appoint one without summoning the inf. at all for that would answer no purpose. this is not done however without special application if the mother is alive. Thus our courts of probate have the same power in their particular districts that the Ch<sup>l</sup>-res in Eng. & they can remove any guardian whatever even a father. as I construe the statute. the authority given by it being very extensive. *2 Root 323. Stat. Con 373.*

Under the former settlement law of Con. it was determined that a widow might live with



his guardian whether he were settled in the same town or not & the town in which the guardian was settled could not remove him. 1 Root 131. & ib. 2 ib. 320. In fact the reason since our new stat. I think this cannot be law. Under our old stat. the town might remove persons whether chargeable or not if not settled and these rules amount to this that a ward could not be removed merely because not settled. but I should think that he might be removed and the interest of both towns require it.

A ward never gains a settlement by commorancy but if he becomes chargeable he may be removed. Under our law a guardian appointed for a ward under the age of choosing continues of course until the ward is 21. unless another is appointed. Vint. 252. 286.7.

By our law the court of probate is required to take security of the guardian for the faithful discharge of his duty. and if the ward has any estate the security must be with security. The guardian is thus bound to account with the ward when of full age and before if required by the court. H. Con. 373. 458.

But a guardian thus appointed is not liable to be sent to account by the ward while a minor, unless the court of probate call upon him to do it. 1 Root. 51. 2.

By P.L. also & by the Eng. law of E. 4. all guardians except those in chivalry are compellable to account for their wards property in their hands and since the guardianship in chiv. is abolished by stat.

12 Car. 2. the rule extends to all guardians whatever.  
1 Inst. 89. n. 9.

The usual method of bringing the guardian to account is in Eng. by a bill in Ch<sup>l</sup> for that proceeding in Eng is far more extensively remedial than an act of account for the courts of law can compel no disclosure of papers books facts &c under oath & indeed this action has almost entirely gone out of use, there have been but two or three instances of during the present reign. 1 Bl. 463. 1 Inst. 88. n. 9. 2 Bac. 679. 687.

The usual remedy in Con. is by act<sup>n</sup> of account for under an stat. that action is nearly & perhaps quite as remedial as a bill in Ch<sup>l</sup> in Eng. indeed our courts and auditors have all the powers of an Eng. Ct. of Eq<sup>l</sup>. Stat. Con. tit. acc<sup>t</sup>.

And if it appears that the ward estate is in danger of being unbefitted or squandered thro the insufficiency of the guardian he may be compelled to account at any time & this is the rule att<sup>d</sup> the father may be the guardian. 1 Eq. Ca. 137. 260. 2 Mod. 177. 2 Bac. 679.

In case of any misconduct the court of Ch<sup>l</sup> may remove the guardian. indeed the power of that court is most extensively discretionary. it being the paramount guardian of all minors in the Kingdom as the representative of the King. 1 Eq. Ca. 261. 1 P. W. 703. 1 Bl. 463. 1 Vern. 242. 1 Ky. 160.

A guardian as such is bound to maintain his ward at his own expense. tho when it happens that the parent is guard<sup>n</sup> the rule does not apply. for parents



according to a former rule one absolutely bound to maintain their children. any other guardian is allowed to apply his ward's estate to his education & maintenance even but a parent must support the ward & educate himself if of ability for Ch<sup>l</sup>. will not suffer the ward's estate to be taken for this purpose. 1 Bro. Cha. 387. 3 Attk. 399. 1 Vin. 255.

If the parent who is guardian is not of ability to give his ward such an education as the ward's situation & property demand, a part of the latter's estate may be applied for this purpose by permission of the court of Ch<sup>l</sup>. but not otherwise. ib. and

But from a rule already laid down a wife is not bound to support her children by a former husband. so if she is the guardian she may apply the ward's estate to his maintenance & education otherwise her husband must be supported which the law does not allow in Eng. 1 Bro. Cha. 268. 1 Vy. 160. n. Contra. 2 Vent. 363. not law.

It has been said that for any thing more than necessary, ordinary expenses in maintaining the child the parent may apply the child's estate if the object be advantageous & reasonable as a profitable apprenticeship or a profitable trade. But this has been denied by L. Hardwicke who says that the parent shall not take the property of the child. 2 Vent. 353. 2 Vin. 137. 255. 3 Attk. 399. Bunt. 136.

If I might be allowed to speculate I should think rather of their rules than our for both are laid

down without any reference to the ability of the parent, and it seems most correct to say that each case should be left to the court under its special circumstances, both the rules apparently requiring qualification.

In Con

when the interest of an infant mortgage is decreed to be reconveyed on a bill for redemption the guardian is empowered to execute the conveyance & he may be compelled to do it under a power of attorney. In case there is no guardian the guardian ad litem has the same power and a conveyance thus made is valid. H. Con. 227.

I see no advantage in this state provision for such acts as an infant is compellable to perform bind him a fortiori will it then when actually required to do it by a decree of the court. 2 Bar. 1794. 1 Bl. Rep. 575.

So also by our law the guardian of an heir of a dec'd. joint tenant or tenant in common, is empowered, with the assistance of such persons as a court of probate shall appoint to make partition of the lands & such partition shall be considered valid as between the infant & the other party. By. C. L. however infants might make binding partitions if there were no funds in the case. H. Con 437. 3 Bar. 1801.

And it seems that in Eng.

a guardian may bind the ward by an equal partition and it is said that his prochein ami may do it. this appears to be. C. L. 2 Bar. 684. 2 Roll. 256.

Of the cred

itors of the ward upon a compromise with the guardian.



accepts up them his own. the ward shall have the benefit of the discount. for the guardian shall not be permitted to speculate upon the ward's property by buying up his debts & then enforcing them against the ward. for paying the debt the guardian is deemed the agent of the ward and it would be a breach of good faith to allow him to act contrary to this rule. 2 Bac. 687. 2 Cha. Ca. 245.

You will perceive that in Ch. a guardian is regarded as a trustee of the ward & if a stranger tortiously enters the ward's land and takes the profits, he may be compelled to account as trustee or guardian or be sued as a trespasser at the election of the ward. this is allowed in no other case for no adult can be a trespasser as a trustee. 1 Ch. 489. 1 Vern. 436. 2 Bac 687. 2 Vern. 295. 342. 1 Eq. Ca. 280.

And since the rule is the same if the wrong done should have continued upon the land a number of years after the ward attained full age, for in such case he would have to account for the rents & profits during the whole period for he was originally thus liable & the wrong is an continued act. ib. cur.

If the guardian has money belonging to the ward in his hands he must in accounting allow interest for it, unless he can show which is almost impossible that it could not be made to produce. 2 Vy. 629.

If a ward has debts charged upon his estate and the guardian has personal property of his, it is his duty to apply it to the payment of those debts &

not to pay them with his own money & preserve the personal property for the ward for if he might do this interest would accumulate against the ward which this rule was intended to prevent. 1 Cha. Ca. 155. 6

And if the ward's estate is under mortgage the guardian ought to apply the rents & profits to the discharge of the debt to the interest first & then the principal. 2 P. Wm. 279.

A guardian as such has no power to vest the ward's money in lands, but if he does and takes a deed in the ward's name, the latter may at full age take either the lands or the money with the interest. if he takes the money however ch. will compel him to recover the land for he cannot have both. 1 Vern. 435.

But if the ward dies without making his election, his heir cannot claim the land, but his representative is entitled to the money & interest for the right of election is strictly personal & not transmissible, the reason is obvious, the ward was owner of both but when he died his heir & representative had conflicting claims and neither must have power to defeat the other, so that the money goes as if there had been no purchase. 1 Vern. 403. 435.

The guardian in accounting for the ward's money is not obliged to pay more than the principal & interest generally. still however if he were directed to vest the money in the funds & he should place it in some gainful trade, the ward may either have the interest the funds would have produced or the



profits accord from the trade for they move on his own money  
and the guardian is considered as the agent of the ward. in  
such case however suitable allowance is to be made to  
the guardian for his trouble for he acts really in the char-  
acter of bailiff. 2 Vy. 629

As to the marriage of wards the Ch<sup>m</sup>  
exercises an authority which I imagine is unknown in any  
of our states. thus he may by injunction forbid the mar-  
riage of a ward when he thinks it unequal either with  
or against the wishes of the guardian and the prohibition  
is enforced by punishment of all those engaged in disobedience  
even the clergyman that solemnizes the marriage. Tal.  
58. 2 P. Wm 111. 562. 1 Vy. 160. Forbids writing or visiting 11 Vy. 46.

And when there is an apprehen-  
sion that the ward is about to marry impropely the with-  
the consent of the guardian, the Ch<sup>m</sup> will issue an in-  
junction & if necessary secure the person of the ward in  
the possession of friends. 3 Attk 304. I do not  
know that this power has ever been exercised when either  
of the parents was the guardian.

By general usage  
in Con. a grand<sup>d</sup> may bind out his ward as an app-  
rentice according to his discretion

It has been laid  
down in gen<sup>l</sup> terms that the power of the guardian  
over a female ward was determined by her marriage  
she may be emancipated from all parentale control as  
to her person, but I take it not as to her property unless  
her husband is of age. for if he were a minor, his own  
property is not at his own disposal except to purchase.

incapable & states it he would have no other power than that over the property of his wife. 1 Ky. 91. 160.

Of the settlement of minors or infants.

The law of settlement does not fall appropriately under this title but it is well examined here perhaps as any where. The law on this subject is regulated in Con by three state provisions, the first relates to foreigners not belonging to the U.S. the 2<sup>d</sup> to inhabitants of neighbouring states, the 3<sup>d</sup> relates to the settlement of persons originally inhabitants of this state who remove from one town to another.

1<sup>st</sup> No person, not an inhabitant of this or some of the neighbouring states can gain a settlement unless by a vote of the town or of the civil authority protect him or unless he holds & executes some public office. 41 Con 391. Bk 2. 109.

2<sup>d</sup> No inhabitant of another state can gain a settlement in this unless he has one of the above qualifications, or shall have resided one year in the town, and have holden in his own right in free during that residence, real estate to the value of \$334. in state.

3<sup>d</sup> No inhabitant of one town can gain a settlement in another, unless he has one of the foregoing qualifications, <sup>in 1<sup>st</sup> person</sup> or is possessed of his own right in free of lands to the amount of \$100. or have supported himself for years in continuity without being chargeable & he cannot be removed except when he becomes chargeable within that time. whereas a person from



another state may be removed before becoming chargeable it stat. These rules of our stat. regulate only the manner of acquiring original settlements.

But there are other modes of acquiring a settlement at C. L. The 1<sup>st</sup> of these is by birth. a place where a child is first known is considered as his settlement until he is shown to have another 1 Bl. 362. Coath. 433. Comb. 364. Salk 485. 1<sup>st</sup> Ray. 567.

This therefore is in Eng. generally the settlement of a bastard and in all cases if mother father or mother have a settlement the child is settled where born. For it is impossible to rebut the presumption raised by the birth except by proving another settlement. 1 Bl. 362. 3. 259 Coath. 433. Salk 427.

But in case of legitimate children and according to Com. decisions illegitimate also the presumption arising from the place of birth may be rebutted and indeed illegitimacy in Eng. in certain cases (as where fraud is attempted) may come within this rule. in Gen<sup>l</sup> however in Eng. this presumption as to bastards cannot be rebutted. it. are.

But in case of legitimate children this presumption may be rebutted for a settlement may be acquired 2<sup>dly</sup> by parentage. The settlement of the father or maintaining parent is regularly the settlement of the child. this is called derivation settlement. it is not originally acquired by the child, but is transmitted to him like an inheritance which it resembles in this particular. 1 Bl. 363. Comb.

Littl. Co. 371. 2. 3. T. Rep. 114. 16. Galb. 528. 2<sup>d</sup> Ed. 1473.

In Eng.

this species of derivative settlement holds only with regard to legitimate children but if the rule is observed in Con is a true one viz. that the settlement of a child follows that its mother in case of illegitimacy, it would then extend to bastards. 1 Root. 155. 1 Swift. 167

And the set.

tlement of an infant legitimate child not emancipated follows that of the parents regularly. so that such an one acquires not only by birth his father's settlement at the time of birth but also while he continues unemancipated he acquires any such subsequent settlement as the father may acquire. & this rule continues until the child is actually emancipated.

3 T. Rep. 114. 116. 2 ib. 118. Stra. 438. 831. Bar. Sett. Co. 49. 64. 270. 638. 8 T. Rep. 479.

And on the death of the father the settlement of the child not emancipated regularly follows that of the mother. Bar. Sett. Co. 49. 64. 372. 2<sup>d</sup> Ed. Ray. 1473. Stra. 746.

The settlement of the child follows that of the mother on the same principle as it does that of the father while he is alive the burden of maintenance and domestic government then revolving upon her. This rule as to the mother is not universal however. for you will remember, that if she marries again, her husband is not bound to support them. if under seven they are to reside with the mother for nurture. & if her husband can not or will not s. s.



port. there, the town, when they have a settlement must  
do it, according to Eng. law. 1alk 270. 528. 3 Salk. 259  
L<sup>a</sup> Ray. 595. Doug. 9. n.

By Con. law a ward never  
gains a settlement by living with his guardian who  
is appointed by the court of probate, tho he may have  
a right to live with him and he cannot be removed  
the State is that he may if he becomes chargeable.  
and a minor cannot gain a settlement by con-  
sensus unless he is emancipated. 1 Root. 131. 2.

By an acquisition of a new settlement the original  
or former one is lost but in no other way, and a man  
cannot have two settlements at the same time tho he  
may have the qualifications which will entitle him to  
claim a settlement in two or more towns, for he is  
actually settled in such case in the town in which he  
resides if entitled to settlement there. 1 Bl. 363. 4 Ld. 528  
529. Burr. tit. ca. 370.

An infant may under some cir-  
cumstances obtain a settlement by consanguinity & there  
lose his original derivative settlement this by an Eng  
stat. an infant &c may do by living with his master  
1 Bl. 364. L<sup>a</sup> Ray. 567. 3 T. Rep. 116. 356.

And an infant  
by acquiring a settlement of his own becomes ipso fac-  
to emancipated or exempted from further parental  
control the principle is that he being no longer a member  
in the family, he is removed from it so far as it respects  
a right of settlement. 3 T. Rep. 356.

But in Con. no minor can acquire a settlement by residence, not emancipated some other way 1 Root 131. 2 the reason is that he is the sub<sup>d</sup>. of his father who can command his person, time & services, were it otherwise, the relation of parent & child might be supposed to the authority of the parent destroyed.

After a child is emancipated, i. e. after he ceases in law to be regarded as the sub<sup>d</sup> of his father & not subject to his domestic government. He cannot take the benefit of a settlement acquired by the father, of course he may acquire one of his own. 3 T. Rep. 355. 116. Sta. 438. 831. Bur. Set. Ca. 270. 638. 806. 8 T. Rep. 470. 1 Wils. 183.

And this rule holds even when the child continues to live with his father, if it is not under his care or in his service, for he is to be considered as a common boarder or stranger. 5 T. Rep. 588. 1 East. 526.

Emancipation may be effected in three of four ways 1<sup>st</sup> by attaining full age. I do not mean that this is of course an emancipation, as I shall have occasion to observe shortly. Bur. Set. Ca. 270. 1 Wils. 183. 3 T. Rep. 356. 2<sup>d</sup> by marriage, by this an infant is emancipated because the new contract into which he has entered, as he had power to do, is inconsistent with a state of servitude to his father. Sta. 438. 831. 5 T. Rep. 588. 3 ib 116. 1 East 526.

3<sup>d</sup> By gaining a settlement of his own. Thus an app. by the Eng. stat. is emancipated by living with his master. 3 T. Rep. 356.



By contracting any relation inconsistent with his living under the care and government of the maintaining parent. As if a minor under 21. or of 18 should enter into the army. he is emancipated. for another authority has superseded that of the father. Burr. det. Ca. 638. 3 T. Rep. 114. 16. 356. 6 ib. 247. 8 ib. 479.

Observed that emancipation might be obtained by attaining full age. yet it does not of course occasion emancipation for after arriving at full age for if he continues to reside in the family in the character of servant to the father as before and subject to his domestic government as he did while an infant he is not actually emancipated tho he can be at any moment he pleases. If however he should claim to be emancipated altho he lived with the family yet if it were as a boarder. or was in the service of the father by agreement or contract he would be considered as emancipated as much as a third person or stranger in the same circumstances. 6 T. Rep. 252. 1 East. 526. 2 ib. 276.

It follows then that if after attaining full age the child remains with the father as a servant de facto as while an infant. he will have the benefit of any subsequent settlement that the father may acquire.

A settlement may also be acquired by marriage. this is also denoted. for by the marriage the husband's settlement if he has any is communicated to the wife. 1 Bl. 363. 5 ib. 524. 5 ib. 528. Burr. det. Ca. 163. 3<sup>rd</sup>.

Thus if a woman settled in & married a man settled in  
 W. B. becomes her settlement ipso facto, but she loses her  
 original settlement. for the rule is universal that a per-  
 son cannot have two settlements. Bur. Set. Ca. 122. & ib. ante.

And it has been decided that if the husband has no settle-  
 ment as in case he is an alien, marries a woman who has  
 hers is suspended during coverture and revives again on his  
 death: this decision was made both in Eng & Con. Bur  
 Set. Ca. 122. Hwa. 544. 683. 2 East 232.

This rule  
 was recognized and taken for granted. indeed it led to  
 immortality for it was set in two stanzas of poetry thus.

A woman having a settlement,

Quoth Sir John Pratt, her settlement

Married a man with none,

Suspended did remain

The question was, he being dead,

Living the husband: but him dead,

If that she had was gone.

It doth revive again.

Chorus of juristic judges. Living the husband: but him dead,

\* Ch. Jas.

It doth revive again W. S. Ca. 122

But it seems now settled notwithstanding the poetry  
 that if the husband has no settlement, does not remain in  
 the value or if he does, does not support & live with his  
 wife her settlement is not suspended, and her children  
 as well as herself may take advantage of it. Bur. Set. Ca.  
 367. 370. 371. 373. 122.









339.

## Sheriffs & Gaolers.

I am now to treat of the rights and duties of Sheriffs and their under officers and also of some other topics which are sufficient to be clasped under the title.

The word

Sheriff in its saxon etymology imports the governor of the shire or county. shire & vice. he being the first executive or ministerial officer of the county. 1 Bl. 339. 343.

for the manner of his appointment in Eng. see. 1 Bl. 340.  
4 Bac. 431. 2. 434. 5.

In Con. this officer is appointed by the gov<sup>t</sup> & senate or as stated in the laws. council, and one, is appointed here as I suppose in all the states in each county. he then holds his office during the pleasure of the appointing body so that his authority terminates only by death, resignation or removal.  
4. Con. 383.

Every Sheriff must reside in the county for which he is appointed. being a county officer and he has regularly no jurisdiction out of his own county this however is not universally true. for if it be necessary for the purpose of completing an official act begun in his own county that he should go out of it, it is in his power to go out for the purpose. thus if a ~~plaintiff~~ owner of goods attached with whom it is necessary to have a copy of process live out of the county. or if he is ordered to bring a prisoner from his own county to the court in another by a habeas corp. his authority does not determine when he reaches the county.



lim. & Bac. 435.

And if a person escapes from the Sheriff's place from one county to another, the Sheriff may pursue & arrest in the other county. the prisoner is here retaken upon the same principle. for the retaking is only a continuance & furtherance of his local authority in the original arrest. Plow. 37. & Bac. 435.

And upon another principle he may do or rather complete official acts after the termination of his office, as when he has seized goods & is removed before the sale. He not only may but must go on with the sale of them, altho he is divested of his office. for the Ex<sup>te</sup> is an entire act, the maxim being that process is indivisible so that one cannot begin and another complete, it being in judgment of law an individual act. 12 Lk 323. Cro. 73. 557. 10 R. 893. 4.

And these same rules, as to local authority and completion of process extend generally well to constables.

A Sheriff may at C. L. appoint deputies or under sheriffs who as his representatives or servants may execute all the ordinary ministerial duties of his office. I say ministerial for he has other duties which cannot be performed by any but himself. Hob. 13. & Bac. 437.

By a late act of Con. however a Sheriff cannot appoint a general deputy without the approbation of the C. J. But the Sheriffs of the various counties may deputize each other and also appoint special deputies without such approbation  
St. con. 501.

Every Dep<sup>y</sup> Shff is removable at the pleasure of the Shff for he acts as the representative agent of the Shff. and by the authority which he has conferred upon him. But while the Dep<sup>y</sup> remains in office, his gen<sup>l</sup> powers as Dep<sup>y</sup> cannot be abridged by any act of the Shff for the latter cannot say he shall be Deft & not have all the powers in as much for the Ex<sup>y</sup> of his office it would be to prevent the ex<sup>y</sup> of the laws. Salk 95. Dot. 13. L Bac 437. 440.

And in certain cases in con. a Court may fine suspend or remove a Dep<sup>y</sup> Shff. not so at C.L. so that he may here be removed by the Shff & C.L. H. Con. 501.

In Eng. the Dep<sup>y</sup> acts officially only in the name of the Shff. for the Dep<sup>y</sup> is not regarded by the law as a known public officer but merely as the serv<sup>t</sup> or official agent of the Shff and for the same reason at C.L. writs are in all cases directed to the Shff & never to his deputy. and tho the Dep<sup>y</sup> may execute yet he cannot return it in his own name i.e. the endorsement of service must be in the name of the Shff. Salk 96. Comp. 65. L Bac. 437. 6th. 149.

In this state on the other hand he may act in his own name for he is here known & regarded by the law as a public officer. so that writs may be directed to him as well as to the Shff as they usually are and they may be served & returned by him in his own name. H. Con 214. 212.

This you will observe is different from the C.L. being a entirely a stat. provision, and it has been determined in con that a writ directed



to the Sheriff only. may be executed by the Dep<sup>y</sup>. and in his own name. whether the Dep<sup>y</sup> was genl. or special.

Yerke 237.

I have already observed that while the Dep<sup>y</sup> continues in office the Sheriff cannot abridge his powers. Hence a court entered into by the Dep<sup>y</sup> not to execute process of a certain description, is void as when the Sheriff would then himself monopolize the profitable part of the business. for it is the duty of a Dep<sup>y</sup> to every officer to execute any legal process that may be offered to him. Hob. 14. 4 Bac. 438. 9.

A Dep<sup>y</sup> Sheriff cannot however delegate his authority. for his own authority itself is delegated. and it is a kind of elementary principle in jurisprudence as well as in politics that a man representative or agent who acts by delegated authority cannot delegate his authority unless specially authorized. any man however who acts by virtue of his own right may do this as an Eng Peer who is the representative in our may vote by proxy. but an Alt<sup>y</sup> cannot substitute without express provision for the purpose in the power as then indeed often is. & all upon the same principle that a derivative power cannot be delegated.

A Dep<sup>y</sup> may however order others to assist him in the performance of his duty, as to order an assistant to make an arrest in his presence. but this is no delegation of authority or assignment of power 4 Bac. 442. Salk. 96.

There is a rule laid down in this

subject which requires qualification. it is said that an arrest by the apt. of a Dep<sup>t</sup>. Shff is not good. it must refer to arrests made when the Dep<sup>t</sup>. is not himself present in pursuit of the same object. 6 Mod. 211.

Of a Shff

directs a warrant to two or more persons either of them may execute it, for when an authority of a public nature is given to two or more, it is several as well as joint but if it be of a private nature it is joint & not several. 1 Inst. 181. Fla. 117. 4 Bac. 403. 442.

If a Dep<sup>t</sup>. is guilty of any neglect of duty as by suffering an escape the Shff may have an action on the case immediately against him for he is himself liable over to the party injured. besides it is a violation of Dep<sup>t</sup>. implied agreement to do his duty faithfully which the appointment & acceptance places him under. indeed every officer enters this implied agreement when he undertakes the discharge of his duties. this is to the public but the agreement of the Dep<sup>t</sup>. Shff is with the Shff for he is personally liable. 1 Roll. 98. 4 Bac. 442.

The jailors in the several counties are the servants of the Shff appointed & removed by them. for the Shff is ex officio the keeper of the jail in his own county. 4 Co. 34. 9 id. 119. H. Con. 222.

The Shff as jailor

has regularly no right to confine a person in any other place than the common jail. that being the place appointed by law for their confinement. and if he does he is guilty of false imprisonment by the gent. rule. I say gent. rule for there may be provisions made by stat. for imprisoning in



etwgate. or penitentiary. but without such exception the rule is universal. for he acts without authority of law. Hob. 202. Lat et. 16. 1 Sid. 318. 2 Lalk 408. 5 Bac. 171.

The Sheriff being ex officio keeper of the gaol. it follows that he cannot be imprisoned in his own county. of course he cannot be arrested in his own county on civil process. for an arrest is made as preparatory to imprisonment & it has been determined in Ct. that if a Sheriff is thus arrested the writ will abate. Kirk. 48. 2 Bac. 239. Styke 465.

If indeed there is a special prison for common purposes in the Ct. as there is in Eng. of which the Sheriff is not the keeper I suppose he may be arrested & committed to it like any other individual. but he cannot be made his own turnkey. Our law does not provide for criminal cases. I suppose however that from necessity the Sheriff might be arrested & imprisoned in an adjoining county. this appeared to be the opinion of the professor & court at an incidental discussion of the subject.

There had a case in Middlesex county who when confined called for the keys & let himself out. the officer however suffered severely as for an escape. for the our statute allows the use of our prisons yet that does not constitute the marshal's prison keeper.

As an under Sheriff or deputy is but the representative or agent of the Sheriff it follows that the Sheriff is generally liable civilliter for the official acts or defaults of his deputy agreeable to the maxim. facit per alium facit per se.

you will observe that civiliter is the emphatical word in that rule. 9. Co. 98. 5 Co. 89. 1 Roll. 94. 2 Lw. 158. 1 Vent. 314.

You perceive that the liability of the Shff in this case is similar to that of Master for the acts of his servant, in consequence of this liability the Shff is allowed to take security of his deputies for the faithful discharge of their duties for such bond taken by a stranger would be void. Style 18. 13 Bac. 241

On this subject of the Shff's liability the great rule of law is that the acts of the Dep<sup>s</sup> are to all civil purposes the acts of the Shff so that he is liable civilly for them but not criminally, for to subject any person criminally he must have been personally guilty. 2 L<sup>d</sup>. Ray 1374. Doug. 42. 2 T. Rep. 154 Latch 187. Cro. J<sup>c</sup>. 330. 1 Vent. 238.

But this liability of the Shff is limited to the official acts of his Dep<sup>s</sup> for the private torts of the Dep<sup>s</sup> committed by him in his individual capacity the Shff is not liable, as if he should commit a fraud. 1 Roll. 94. Cro. Ely. 175. 1 Shon. 146.

It has therefore been doubted whether if a Dep<sup>s</sup> levies an execution against A. upon the goods or person of B. the Shff would be liable. because on the one hand it is said that he does not act in pursuance of his authority so that he cannot be considered in law as the agent of the Shff. But I take the rule to be well settled that the Shff is liable for the Dep<sup>s</sup> acts officially, the rule which subjects the Shff does not contemplate those acts which are communis thus for ought to serve process the Shff



is liable yet he is not supposed to command or supervise of duty. so that the reason alleged would completely prevent the Shffs. liability in any case. 4 Bac. 442. 2 Bl. Rep. 832. Doug. 42. 3 Will. 309.

And when the officer committed by the Shff. is with force the Shff. is liable in trespass. so that the form of the remedy is different from that which obtains against the master for the acts of his servant who would be liable in case only. the reason assigned for the distinction is that the Shff. & all his officers are in Law but an officer, this seems does not appear entirely satisfactory to me. 2 Bl. Rep. 832. 4. 2 Will. 352. 10y. 27. Doug. 42.

For an omission of duty on the part of the Shff. the Shff. only is liable & not the Shff. He has his remedy over against the Shff. as if he omits to execute process or suffers an exigent escape, an action would not lie ag<sup>t</sup> the Shff. at C. L. for he is not considered as a known public officer. Suppose the act. bro<sup>t</sup> ag<sup>t</sup> him for neglecting to execute process. the process must be given in evidence. and as it appears to be directed to the Shff. only it will not support the action. Comp. 403. 406. Salk. 18. 5 Co. 89. 1 Roll. 94. 2 Bac 243.

But for private torts committed by a Shff. in the discharge of his office, both are liable the Shff. as well as the Shff. for the party injured may consider the party injuring as a mere tort feasor. I need not enquire by what authority he acts. As when he takes the goods of a man ag<sup>t</sup> B. he acts as the representative of Shff. who is really liable. the person injured is

not bound to act by what precept or authority he acts. for that would be perfectly ineffectual & nugatory as to Shff. defence

Of on the other hand the officer is by omission the authority by which he is bound to act must appear. that being the ground of the action. Salk. 18. Cro. Ely. 175. 1 East. 106. 3 Sw. 258.

To illustrate this in case of a voluntary escape the Dep<sup>t</sup>. is liable. for it is a positive tort or misfeasance. his authority is no justification and he is liable as a person would be. it is a voluntary breach of law & therefore he may be subjected personally on grounds already specified & explained.

The Shff is not liable for the acts & defaults of a special dep<sup>t</sup>. appointed at the request of the Shff in the action and by his nomination. as if he makes a default in not executing the writ. for the appointment is made at the request of Shff and on his risk. But if the special Dep<sup>t</sup>. should be guilty of any wrong or injurious acts to third persons as to the Dep<sup>t</sup>. the Shff is liable. so that his liability in this case is only restricted in relation to the Shff who risks his own rights. 11 T. Rep. 120. Exp. Dig. 607.

Under our law by which a Dep<sup>t</sup>. is considered as a known public off<sup>r</sup>. the Dep<sup>t</sup>. is liable as well for defaults as for positive torts. for misfeasances as well as mismanagements. for he acts in his own name both in fact & form. the indorsement of service is in his own name. & he is liable precisely as extensively for his own acts as the Shff is by C. L. for his. & the Shff, liability is the same in Com. as by C. L. these rules relating to the liability of Shff for the acts and



defaults of his under Shff. apply equally well to the acts of his gaolers. for as to this purpose they are his Shff.

After the death of a Shff & before another is appointed if a prisoner escapes no one is liable by C.L. for it is in fact a revocation of the gaolers authority. in such all delegated authority ceases at the death of the principal except testamentary authority which in strictness cannot be said to be an exception. The only remedy then at C.L. in such case is a new appointment as soon as possible. the representations of decessors are not the representations of the Shff. and the gaolers authority is determined immediately & Bac. 445. 3 Co. 72. Cro Ely. 366

The only remedy then as before observed is to appoint a successor as soon as possible and have him retake the prisoners. there is however no inconvenience to be apprehended in this case. for the gaoler would continue his authority de facto & rely upon the legislature for an indemnity. 1 Mod. 14. & Bac. 445.

I have thus far spoken of the character of Shff. his relation to & liability on acct. of his Shff. I am now to speak of

The authority & duties of the Shff his subordinate officers. 1 Bl. 343.

By the C.L. a Shff is a judicial as well as an executive & ministerial officer. in this state however he has no judicial authority whatever nor used in N. Eng. I shall therefore treat of him as a ministerial officer & a conservator of the peace, in which latter character he

is strictly an Executive officer. According to my understanding of the terms a ministerial officer is one who executes the law in obedience to the command of some superior officer. thus the sheriff acts in executing a writ or warrant. this is strictly ministerial, an executive officer on the other hand, is one who obeys or executes the laws without any such command of a superior, as the heads of departments acting in obedience to the laws only are executive officers. but their subordinate officers who act in obedience to their commands in executing the laws are ministerial officers. these then are the two great departments of the Sheriff's power as understood by our laws. As an Ex. off. he is the conservator of the peace of the Co. & the first Ex. off. in the Co. or as it might be more properly said of the Co. or the highest Ex. Co. off. 1 Bl. 343. 1 Keb. 237. 44. Con. 384.

As a conservator of the peace the Sheriff at C. G. may & must apprehend & commit to prison all persons who break or attempt to break the peace & may bind them to keep the peace. this binding over however is a judicial act which a Sheriff in Con. is not authorized to do. He is also bound ex officio to arrest or apprehend generally all offenders against the laws, as traitors murderers &c all felons & commit them to safe custody. to defend the Co. agt. not only riots, mobs &c but all enemies foreign or domestic and this is one of his leading duties. & for this purpose he may command the proper considerable power of the Co. which at C. G. consists of all male persons over the age of 15. & cpts. Pers. 1 Inst. 168. 4 Bac. 420



4 Bac. 253. 1 Bl. 223.

Our stat. invests the Shff with similar powers except those in relation to judicial acts as to arrest offenders &c. and also to command the power of the Co. or proper. which by our stat. consists of all persons of age & ability which of course includes females. H. Con. 384.

And by our stat. similar power is given to constables within their respective towns in stat.

As a ministerial officer the Shff is bound to execute all legal process regularly directed to him & upon refusal or neglect he is subject to fine, imprisonment and to a civil suit on the case by the party injured by such neglect or default. Plow. 74. Dyer. 60. 1 Bl. 344 Stat. Con. 385.

And by our stat. the Shff is liable in a civil suit for neglect of duty in which he is not at C. & as for neglecting to return a writ in Con. an action the case lies for this. indeed he is liable at C. & for not returning a writ as well as for not moving but the process is a summary one viz. by making a rule requiring him to return it. and if he does not he is subjected to an attachment as for contempt & the fine thus inflicted & moreover the party injured. Doug. 446. 2 N. H. Bl. 233. 1 Bac. 58. 206. 3 Bl. 461. 2. Esp. Dig. 616. H. Con. 601.

By our statute every Shff or constable is bound to give a receipt for every writ delivered to him if demanded. H. Con. 385.

I have observed that the Sheriff may commit and the proper to arrest him to keep the peace. He or his Deputy may do the same thing when necessary for the purpose of executing process, and every person is bound under severe penalties to assist. 2 Inst. 193. 453. 4 Bac. 453.

You have a further provision not known to the C.H. that if there be a disposition made or suspected to be made to the execution of process, the off. may with the advice of a justice or a justice raise part or even the whole body of militia <sup>in Co.</sup> to assist him, that is in their military capacity and organised under their own officers. He appointing himself generalissimo. for the stat enacts that no officer shall return that he cannot execute the process. H. Con 384.

There is a series of important rules relating to the privileges of a castle or mansion house when a Sheriff is justified in breaking an outer door or window & when not for which I would refer you to the title of Trespass.

I would observe however that if a person illegally arrested by breaking of outer door or window, is charged while under this arrest with another process, the latter is good provided there was no collusion between the parties in the act, or between the officers, but such collusion vacates the whole. 2 Bl. Rep. 523. Esp. Dig. 605.

By stat. 29.

Cor. 2 & a similar one of our own no civil process can be served on Sunday, and service on that day will be void and the Sheriff guilty of false imprisonment. this you will



abuse is not a man of C.L. but by stat. 4 Bac. 456. 656.  
H. Con. 307. Falk. 78.

This statute however relates only to original arrests. for if a person escapes on Sunday, he may be pursued & retaken on that day, or even if he escapes on another day, he may be retaken on that precisely as at C.L. for the act of retaking is no more than the means of continuing the Sheriff's lawful arrest & custody and the rule stands upon the same principle as this that the Sheriff may on Sunday guard the prison door or resist an attempt made to escape on that day. 2 Bac. 245. 2 Ray. 1028. Falk. 622. 5 T. Rep. 256 Mod. 95.

In case of an illegal arrest on Sunday, the court will order the prisoner discharged on motion or he may doubtless be discharged by Nat. corp. 6 Mod. 95. 4 Bac. 456.

The duties of the Sheriff as a ministerial officer to arrest & imprison lead to an important branch of the law viz. escapes. this is sometimes placed under the title of trespass on the case but it comes on appropriately in this place.

Of Escapes. When a person is under lawful arrest & restrained of his liberty either voluntarily or privately under that restraint or is suffered to go at large before he is discharged by due course of law, he is said to escape or is guilty of an escape. An escape then is the evasion of lawful custody or restraint 2 Bac 233.

Of course it is essential to constitute an escape, that there should have been a previous legal arrest, for the evasion of an illegal arrest is at law according to the definition given no escape. Esp. Dig. 607, 8, 9. Comp. 65.

As introductory to the law of escapes we must consider that of arrests. The arrest must have been made in pursuance of lawful authority, in and an arrest not in pursuance of lawful authority is void and in itself unlawful & an offence. But I do not mean that the arrest must in all cases have been made in pursuance of a lawful writ or warrant. For a legal arrest may be made without a warrant, as in that numerous class of cases in which it is the duty of a constable to arrest offenders and he may arrest with a warrant. 4 Bac. 455.

When the arrest is made by virtue of a writ or warrant, the general rule by C. J. to determine whether the arrest was lawful is, that if the court upon whose authority the writ issued has jurisdiction of the subject matter of it, the arrest is lawful, that is the writ will warrant an arrest, of course suffering the prisoner to go at large after such arrest will be an escape.

This rule presupposes the mode of arresting to have been regular & lawful, for the arrest might have been unlawful from the manner of its execution, as by breaking an outer door or window &c. But the circumstance of the process being erroneous is no objection to the arrest, for when issued by good authority.



ity, the writ continues good & unaffected to every purpose until set aside by due course of law. whereas a void writ is void ab initio. 2 Bac. 234. 236. 2 Wils. 384. 8 Co. 140. b. 5 Co. 84. The. 509.

On the other hand if the court by whom authority the writ issued has no jurisdiction of the subject matter, the writ is unlawful. for the writ is void and of course the arrest is. in such case therefore there can be no escape. & if an officer makes such an arrest, he ought to release the prisoner as soon as he finds his mistake. 2 Bac. 234. Esp. Dig. 333. 391. 608. q. 659. 2 Wils. 384.

To illustrate these rules, the 1<sup>st</sup> question is that if the court has jurisdiction the arrest is lawful. thus suppose that in an act of debt an warrant issues from the C<sup>t</sup> of C. P. in Eng. and the Def<sup>t</sup> is regularly arrested under it. the arrest is lawful. but on the other hand suppose an arrest made under a criminal process issued by the same court. it is void for that court has no jurisdiction in criminal matters. Again under our own law, a magistrate has jurisdiction in cases where no more than \$15 is demanded. suppose an act of trespass brought demanding \$15. an arrest made under the magistrate's warrant is lawful. But if the writ contains a demand of \$50. the arrest is void & the officer guilty of false imprisonment.

But the first branch of this rule of distinction is not universal, tho it is universally true as laid down in the last branch, that if the

court have no jurisdiction the arrest is void. For altho the warrant might have issued from proper authority still the arrest might have been void from the irregularity or informality of the warrant.

Thus suppose a writ issued to day returnable 20<sup>th</sup> June. or indeed at any other time than the next succeeding term of the court. an arrest under it is void. for if only voidable it could only be voided by pleading when the cause came on. and if not void one person might oppress another beyond measure for Dep<sup>t</sup>. would be imprisoned during the whole time or find bail which would be extremely difficult to secure appearance 20<sup>th</sup> June. Now then altho the jurisdiction is complete yet the arrest is void and of course in such case there can be no escape. 3 Wils. 341. Esp. Dig. 328. q. 608. q. Salk. 273. Cro. Eliz. 148. Carlt. 148. 1 Root. 315.

In con. mesn. process does not usually issue from the court applied to for redress tho it sometimes does. The genl. rule therefore is not sufficiently broad to reach all arrests made under mesn. process in our practice.

As to Cases of mesn. process then not covered by the genl. C. L. rule. the rule in Ct. must be this. If the process is issued by competent authority & returnable to a Ct. having jurisdiction of the subject matter. an arrest made under it is lawful. if the mode of arrest is proper. & Crown suffering the prisoner to go at large may be an escape. Ex. gr. If not surrounded before return of Ex<sup>h</sup>.



Secus if spent without competent authority, or return-  
able to a court having no jurisdiction. Ex. Act. for \$100. be  
for a single magistrate, or spent by an individual.  
Irregularity renders the process void, but as in Eng.

At C. L. an officer having made an arrest on final  
process cannot delegate to a stranger a right to hold  
the prisoner in his own absence. 1 B & P. 24. not even  
for a moment & if the prisoner evades this restraint  
the officer is guilty of an escape. The off. in con-  
clavate from this rule & I know not how far cus-  
tom may go to sanction the practice, but think  
of C. L. in Eng is well established.

Secondly an ar-  
rest must have been actually & regularly made or  
there can be no escape 4 Bac. 236. Esp. 604.

Barrow  
will not make an arrest. There must be an actual  
touching of the body, or what is tantamount a power  
of immediate poss<sup>n</sup> of the person & submission to it.  
1 Esp 604. 2 Bac. 236. 64. If the officer merely says  
"I arrest you" and the party runs from him, there is no  
arrest & of course no escape. If however the party  
submits & goes with the officer the arrest is quasi  
without actual touching. Saulk 79. 586. B & P 62

If one is arrested on the writ of *habeas corpus* & while in custody a writ  
in *Bassavon* is delivered to the off<sup>r</sup> ag<sup>t</sup> him, the Def<sup>r</sup> is  
by construction of law, ipso facto in the custody of the  
2<sup>d</sup> writ also, of course if he is suffered to go at large

the officer is guilty of an escape or both. 2 Bac. 236  
5 Co. 89. Salk. 237. I cannot say to what extent this rule  
would hold in Con. but suppose the Dept. would be inces-  
santly for the second writ when he has no personal prop-  
erty to respond the claim. & when the Off. has directed the  
Off. to take the person. But the officer need not arrest  
without these provisions. See Eng. but except of arrest is  
process of arrest. & therefore the rule is well es-  
tablished there, but here the attack goes ag<sup>t</sup> the per-  
son as well as the property.

The arrest must be regularly, i.e.  
legally made or just. speaking there can be no escape. Thus  
in all civil cases the arrest must be made by virtue of  
a legal writ or warrant & even then can be no escape  
Esp. 604. 2 Bac. 236. Comp. 64.

Must be made by the Off.  
to whom the writ or warrant is directed, i.e. he must  
be in company of the person actually arresting, but the ar-  
rest may be made by the hands of a follower, and the  
Off. need not be actually present or in sight. It is  
suff. that he is near & in pursuit of the same. Esp.  
Comp. 65. 6 Mod. 211. Esp. 604.

An arrest on sabbath  
being void an Off. is not chargeable with an escape  
if he lets the prisoner go at large. for all arrests  
in Eng & Ct. except for treason felony or breach of the  
peace are void. 6 Mod. 95. Salk 78. Esp. Dig. 605. 6. 7.

So if an arrest is made by breaking an outer door, or  
window of Dept. dwelling house, there can regularly be no



escape. Esp. Dig. 604.5. Comp. 9.

If off<sup>r</sup> having opportunity to take Dep<sup>t</sup> refuses to arrest him & the latter eventually evades an arrest, the off<sup>r</sup> is liable in cases for neglect of duty. but there being no escape he is not liable for one. 2 Bac. 236. n. 2 Mod 234. 2 Kay. 331. 10 Mod. 251.5

An officer exercising a general authority as a Shff or gen<sup>l</sup> Dep<sup>t</sup> or constable is not bound to show his writ or warrant before he makes the arrest, & says the goods were the the Dep<sup>t</sup> should demand it. But on making the arrest he is bound to his authority & the contents of his writ. 9 Co. 69. Cro. Jac. 485. 8 T. Rep. 187. Esp. Dig. 604. The reason of this rule is that every person is supposed to know the character of our off<sup>r</sup> that is gen<sup>l</sup>. But on the other hand a special Dep<sup>t</sup> bailiff is bound to show his authority & writ on demand before the arrest, otherwise the Dep<sup>t</sup> may visit him in justice for he is not a known public off<sup>r</sup>. In such case he is not bound to submit to unknown authority for if he were any officer might seize him under pretence of an arrest. If then the Dep<sup>t</sup> does thus arrest him he does it at his peril. 9 Co. 69. 2 Bac. 454

Escapes are of two kinds, voluntary & negligent. A voluntary escape is one which takes place with the consent of the off<sup>r</sup> holding the party in custody. A negligent escape is one which takes place without this consent. 3 Bl. 415. 3 Co. 52. 1 Sid. 330. 2 Bac. 239.

I would here premise that every person committed to prison shall be kept in safe & close custody. "salva & aucta custodia". If the Sheriff suffers the party committed to leave the prison for a moment he is as much guilty of an escape as if he had permitted him to leave it for years; for the law distinguishes not between reasonable & unreasonable times. 3 Co. 44. Plow. 36. 1 Role 806. 3. Bl. 415

Of voluntary escapes. If Sheriff or gaoler allows to bail a prisoner not bailable he is guilty of a voluntary escape. So if he consents to the prisoner going at large for a moment or beyond the limits of the prison with a Purser. 2 Bac. 237 & its anc.

Make the same if the arrest is an Ex. & not comm. the no diff. between escapes after an arrest & one after commitment. 2 T. Rep. 176. 1 B. & P. 1726.

Prisoners arrested on crime process should regularly be kept within the walls of the prison. those comm. on civil process are sometimes admitted to the liberties of the prison yard on giving security to sever the Sheriff's handcuffs. These liberties are however a part of the prison; for it is not meant by salva & aucta custodia that the prisoner should be kept within the walls of the prison when he has been committed on civil process only. In case of criminal process the prison is not considered as extending over the liberties however. 2 T. Rep. 126. 131.

It has been once decided in Eng. that if a prisoner committed on Ex. is broken by Stat. corp. act.



testificandum it is a voluntary escape. 2 Bac. 2389. 1 Mod 13  
 But this seems not to be law. for the shff acts in obedience  
 to an order of court to secure himself from future im-  
 prisonment. 13. et. P. 72. 1 Root 72. Kibb 137.

But if the off<sup>r</sup>  
 who brings out the prisoner on a habeas corp. grants him any un-  
 necessary liberty or unwararable, it is a voluntary escape  
 Ex. taking him so miles out of the direct road to give  
 him an airing. He must bring him to court in a  
 convenient time in the most convenient way.  
 2 Bac. 2389. 2 Keb. 305. 2 Ray. 241. 399. 788. 4 Mod  
 78. Cro. C. 14

To an off<sup>r</sup> having made an arrest or final pro-  
 cess must commit in convenient time to prison, or he is  
 guilty of a voluntary escape. So if he permits prisoner to go  
 about with his off<sup>r</sup> sword, &c. arrest being preparatory to  
 imprisonment which must be in the common goal, 1034  
 P. 24. 2 T. Rep. 176.

Shff has no right to discharge a prisoner  
 committed on Ex<sup>m</sup> upon pay<sup>t</sup>. to him self of the contents  
 of the Ex<sup>m</sup> but is liable for a vol<sup>t</sup> escape if he does  
 2 Bac. 248. Cro. Elj. 404. 1 Mod. 494. 8 Mod. 225. 366  
 For he is not Shff. etc. & has no right to receive the  
 money.

If Shff manes a woman committed on Ex<sup>m</sup>  
 he is guilty of a voluntary escape for a man can-  
 not be a gaoler to his wife. 2 Bac. 239. Plow. 17.

If he appoints one of his prisoners turnkey he is guilt-  
 ty of a voluntary escape. for by the act he removes

the custody of the prisoner. Esp. Dig. 608 Hardf. 311

If a prisoner having the liberty of the goal yard shows a disposition to escape, as by transgressing the limits it is the duty of the gaoler on notice of the fact to recommit him to the walls. otherwise a subsequent escape is voluntary. 2 T. Rep. 131.

But if he escapes before showing such disposition, or before it is known to the gaoler it is negligent. the gaoler not being privy to it. 1 Root. 106. 127. 8. 2 T. Rep. 131

In other words the admission of the prisoner to the liberties of the goal yard does not render his subsequent escape voluntary.

Shiff is not bound to grant the liberties of the goal yard upon bond of indemnity offered. It is matter of discretion & indulgence, he may however lawfully do it. & the bond is of course legal. but he may recommit to the walls at pleasure. 2 T. Rep. 131.

2<sup>d</sup> Negligent: escapes are such as happen without the officer's consent. 3 Bl. 415. Thus if the prisoner arrested escapes, his restraint by fleeing from the officer or by using violence the escape is negligent. So if one committed escapes by breaking the prison or in any other way to which the keeper is not consenting as by rescue. 3 Bl. 416. Cowp. 419.

An acquittal for escape against the officer his endorsement on the warrant is sufficient evidence that the warrant was delivered to him. Cowp. 63. 5.



Diff. between escape on mere & final process.

If a person is arrested on final process, the not committed is permitted to go at large. For a moment the off<sup>r</sup> is liable for an escape and this ~~status~~ enlarged on security given that he shall <sup>again</sup> be surrendered into the custody of the off<sup>r</sup>. <sup>being illegal words</sup> 2 J. Rep. 172. 3 Bl. 415. 1044. 2 J. Rep. 172. 3 Bl. 415. 5 J. Rep. 37. Selk 408. 2 W. 295.

Decided otherwise in C<sup>t</sup> but it is not law. see 2 Root. 33.

But at C. L. a person arrested on mere process & not committed may be permitted to go at large without subjecting the off<sup>r</sup> if he be forthcoming at the return of the writ: In Con. he may let his go at large during the life of the E<sup>d</sup> that may be obtained ag<sup>t</sup> him. for C. L. rule in. 2 Bl. Rep 1044. 2 J. Rep. 172. 3 Bl. 415. 5 J. Rep. 37. Selk 408. 2 W. 295. For Con. rule. H. Con. 39. 2 L. 174. 4 Root 382. 434

The reason of this diversity is that what would not be an escape in case of a person arrested on mere process, would be an escape in case of one arrested on final process; this, that the arrest under final process is a coercive means of obtaining pay<sup>nt</sup>; or it is a species of punishment the not so in fact. - Should the prisoner till he pays. In this case there is no discretion in the off<sup>r</sup> to mitigate this kind of punishment. Therefore he cannot enlarge him that is thus arrested, even for a moment, or it is an escape. But the object of the arrest on mere process is not coercive or

to punish; but merely to secure the person that he may respond to any judg<sup>t</sup> that may be obtained ag<sup>t</sup> him. This object of the law is attained in Eng if he be forth coming at the return of the writ; but as we can obtain judg<sup>t</sup> by default here without personal appearance of Def<sup>t</sup> it is suff<sup>t</sup> if he be forth coming during the life of the Ex<sup>m</sup>. & the shff is not liable if he be not forth coming before that is ended.

And this presents a case in which the officer is made liable for an escape by matter of post facto or in other words that which was not an escape originally is made so by matter of post facto. This escape however is negligent not voluntary. 2 Bac. 240. 2 Roll. 97. 807. Cro. Eliz 623. 52 868. 2 Wils. 294. Esp. 607.

But if a person arrested on *habeas corpus* is committed to the gaol by permitting him to go at large even for a moment subjects himself to an escape. for on commitment every person should be kept *salva carceris*. & a return of the prisoner does not bar the action for by a voluntary escape the gaoler loses the right of custody. 2 Wils. 294. 1 Roll. 807. Esp. 610. Salk 271.

The prisoner may be enlarged by bail however if he applies before the time of enlargement fixed by C.L. is passed & by C.L. not otherwise. This rule that no person arrested on *habeas corpus* shall be permitted to go at large after commitment is not founded on any distinction between



arrests on return of writs of habeas corpus, not merely on the rule that after commitment the prisoner has no right to bail but by the st. hall of Ch. & Eng. he may take bail after commitment. 1 Roll. 87. 2 Wils. 294. Subst. 271 Esp. Dig. 610

And in this latter case the the Plff. proceed to take judgment agt. the orig. Def. who has been permitted to escape. the proceeding does not amount to a waiver of the act agt. the gaoler or Shff. but he may sue the off. for damages immediately, so that he must be responsible at all events. 2 Wils. 294. Esp. 611.

But by a Con. St. & H. 23. Nov. 6. a person committed on return of writs may be enlarged by Shff. on a bail bond as 1 Bac. 275. 1 Hen. Bl. 474. H. Con. tit. Bail.

For the escape of one taken on return of writs only the remedy agt. the Shff. is an action of trespass on the case: & then the damages are presumptive, for the claim of Plff. agt. orig. Def. has not yet been liquidated. And the Plff. cannot support any claim or act against the Shff. unless he prove a legal claim agt. the party escaping. for unless he show such claim it is injuria sine damno. He is entitled to no damages. The safer way therefore is to pursue the orig. Def. to judgment before the action is brought agt. the Shff. 2 Wils. 295 2 T. Rep. 129. 4 T. Rep. 611. Cro. Ely. 17. 2 Str. 873.

I would here observe that it is a rule of evidence that any acknowledgment of the orig. Def. may be admitted

as proof in the act. ag<sup>t</sup> the D<sup>ff</sup> for it may after  
 happen that this is the only remedy. This admission  
 of the third party's acknowledgment in proof is an  
 exception to the genl. rule of evidence & is grounded  
 in this, that as the D<sup>ff</sup> would have been entitled to  
 D<sup>ff</sup>'s acknowledg<sup>t</sup> in the other action he may have  
 it ag<sup>t</sup> the D<sup>ff</sup>, who stands in his shoes & in a  
 great measure incurs his liability. Peake, C. 65.  
 2 T. Rep. 436. 1 Esp. Rep. 169

For an escape or final  
 process D<sup>ff</sup> may have cap. at C. L. or by stat. West. 2 &  
 1 Richd. 2. c. 14 an action of debt. because the claim  
 against the single debt is liquidated or settled to a certainty  
 & the D<sup>ff</sup> is to recover <sup>what</sup> he gave for in money & not in  
 damages. You will observe that debt will not lie for  
 an escape or return process, for the claim is not liquidated  
 but in final process it is liquidated & in that state is trans-  
 ferred to the D<sup>ff</sup> or devolves on him by operation of law.  
 2 T. Rep. 129. 132. Stra. 153. 2 Bac. 245. Esp. Dig. 203  
 2 H. Bl. 110 113.

These rules extend as well to escapes after ar-  
 rest or final process before or after commitment. for by the  
 terms of the stat. there is no difference - the debt is li-  
 quidated & therefore both actions may be supported. But  
 there is one essential difference between the operation  
 or effect of an action of trespass on the one & an act.  
 of debt. In an act. of trespass (which may be had  
 for an escape either on final or return process) the  
 D<sup>ff</sup> recovers damages for the tort or loss of the bene-  
 fit of his action, which damages are uncertain



which tort is consequential. Whereas in debt (which act may be had only for an escape or final process) the jury are bound down to a specific sum of money to be given by their verdict, which the Plff goes for in measure but in damages. The sum demanded is liquidated & certain. & the tort immediate. 2 T. Rep. 129. Esp. Dig. 609

Hence the recovery of damages against the Plff in an act on the case does not discharge the original Def<sup>t</sup>. For the two actions against the Plff & Def<sup>t</sup> are diverse interests. The action ag<sup>t</sup> the Plff is for damages occasioned by the lops or elisions of the orig<sup>l</sup> action, that ag<sup>t</sup> the Def<sup>t</sup> is for a debt not liquidated or ascertained. Hence the jury are not bound to give all the damages for the orig<sup>l</sup> demand yet they may & I think certainly ought to do so. Peake Ev. 172. 3. Peake. Ca. 124. 2 T. Rep. 129.

And hence also as the orig<sup>l</sup> Def<sup>t</sup> is not discharged by a reco<sup>d</sup> ag<sup>t</sup> the Plff. it is a rule of Ev. that the party escaping is a competent witness ag<sup>t</sup> the Plff. for he is not interested in the result of the suit it is said. This appears to be laid down too universally in the books. for such testimony might bar an act<sup>n</sup> ag<sup>t</sup> the party escaping. & hence as to the rule of Ev.

On the other hand if special damages only are given ag<sup>t</sup> the Plff the Plff may never ag<sup>t</sup> the orig<sup>l</sup> debtor. 2 T. Rep. 129. 2 Will. 295.

But if Plff brings debt ag<sup>t</sup> the Plff he may

for escape on final process, the jury must if Shff be found guilty give the whole sum or value of the Ex<sup>t</sup> & the costs of the orig<sup>l</sup> act<sup>n</sup>. & such a recovery is a complete bar to the Plff's claim ag<sup>t</sup> the orig<sup>l</sup> debtor. 2 Bl. Rep. 1048. Esp. Dig. 609. 2 T. Rep. 126. 129. 132

The principle on which the rule of damages here presented is founded is - that when the act<sup>n</sup> is bro<sup>t</sup> ag<sup>t</sup> the Shff he is considered as the debtor, or the debt is transferred to him.

Our stat. seems to require that in case of a voluntary escape from prison whether on return process or final process whatever the form of the action may be the Plff shall recover of the Shff, the whole of the orig<sup>l</sup> debt or damages. H. Con 222. 336

Our st. then, if this is the true construction gives the same rule of damages in all cases of vol<sup>t</sup> escape from prison as obtains in Eng. only in the act<sup>n</sup> of debt for an escape on final process.

If a person arrested on return process but not committed, is rescued, the off<sup>r</sup> is rescued. so also if arrested on final process, for he ought to have suff<sup>t</sup> force, the power of the Co. this reason does not appear to justify the distinction, neither does the one given by Esp. that in the latter case, Shff is supposed to have time to go and ag<sup>t</sup> the rescuer. the rule however is well established 2 Bl. 240. 3 Bl. 416. Cro. J. 419. Esp. 610 Cro. Ely. 873.

But after Shff arrested on return process is committed



rescue is no rescue for Sheriff, unless made by public enemies or the act of God. So that rescue by traitors, robbery or insurgents is no rescue. No power, except that of public enemies or of God, being admitted to be able to overcome the Sheriff with the proper force. Esp. 610. 1 Roll 808. Stra. 482. 1 Co. 84. a.

The same rule holds when an is arrested on final process whether committed or not.

In case of rescue when the Sheriff is liable Ex. after arrest on final process, the Plaintiff may sue either the Sheriff or the rescuer at his election, but if the action is against the latter the Sheriff is discharged according to Esp. whose decision is not always good law. In this however it appears to me to be right, for by a suit against the rescuer the Sheriff is lulled into security & is roused by an action when he is unprepared either for it, or for an indemnifying action against the rescuer. Esp. Dig. 610. 657 659. 6 Mod. 211. Hutt. 98. 4 Bac. 399. Cro. Ch. 77. 109

It is said that the action against the rescuer may be either trespass or case, yet I think it not good for these two actions to lie for the same offence; & I should suppose that trespass on the case would properly be the only action here: for the injury is plainly consequential if the Sheriff has met with a direct injury he may have assault & battery. The rule is well settled however that both actions will lie. Hob. 180. Cro. J. 456. 2 Bac. 399.

and the

original Plaintiff may maintain an action against the rescuer

whether the arrest was on final or return process if the arrest was on final process he has a twofold remedy; if on return process his action is agt. the return only. As J. 486, Hob. 188. Hutt. 98. Civ. Cas. 109.

In an action agt. the return the jury may give either the whole or a part of the Plff's orig<sup>n</sup> demand agt. the party arrested. if only part the Plff may still proceed agt. the orig<sup>n</sup> debtor or party arrested & enforce his claim agt. him 6 Mod. 211. Esp. Dig. 657. 659

In proceeding on the subject of return. I would observe further that in an act<sup>n</sup> agt. the Plff for an escape on return process. if he return a return on the process it is conclusive evidence in his own favour. If the return was in fact false yet the Plff is defeated by it. He may however have an act<sup>n</sup> agt. the Plff for the false return return if the Plff pleads a return it may be rebutted by contrary proof. So that he may thus recover his orig<sup>n</sup> claim. Cro. Eliz. 781. Comb. 295. 1 Inst. 224. 2 ib. 175.

Now this rule is apparently inexpedient & the reason of it at first not very obvious. yet it is founded in principle. Such official acts should not be falsified when they arise incidentally in a suit commenced for another purpose. yet in an action for that intent if any proceeding directly contrary can be shown to put the return in issue, the return may be falsified.

I have before observed that the return was liable



to the Sheriff in the process. The Sheriff also may, in addition, sue a slave in the case against the rescuer. But I trust he can have this action only when he is himself liable to the Sheriff. The object of the action ought to be to indemnify him. So if the rescuer were on a mere process before commitment, he ought to have no action because he is not liable to the Sheriff. But if the rescuer were made on final process or return process after commitment, his own liability should certainly entitle him to sue a slave. The proposition is laid down too general in the books. *Hutt. 98. Cro. Car. 77. 109. Holt. 180.*

But if Sheriff brings up a prisoner in habeas corpus, rescuer is no rescuer for him. The same reason is more palpable for he has had time to prepare the horse countess, better command of it in the vicinity of the court & prison. *Str. 482. Esp. 610*

After a person arrested is actually committed even on mere process, nothing but the act of God or of public enemies will rescue the Sheriff in case of an escape. Thus in the case of *Ch. Geo. Gordon's* riot where a mob of 20,000 people shrouded the prisons of London, Parliament found it necessary to pass an act indemnifying the Sheriffs who would have been otherwise liable to every Sheriff for the escape of their respective prisoners. A similar case occurred at the *g<sup>th</sup>* fire in 1666, about the time of the restoration; so that the conflagration of prisons occasioned otherwise than by lightning is no rescue for an escape. *4 Co. 84. a. 2 H. Bl. 113. 4 T. Rep. 789*  
*esp. 210. 2 Bos. 247.*

There are some diversities to be observed between the consequences of voluntary & negligent escapes. It was formerly held that in cases of voluntary escape the Plff. lost all claim on the party escaping who was absolutely discharged this liability transferred entirely to the Sheriff. This rule so vindictive in its effects on the Sheriff has been reversed by modern decisions. It was not, I think good law, for by it the Plff. was compelled to sue the Sheriff only, thereby losing his election to sue the orig. debtor who was completely exonerated from his action. 202. 2 Bac. 239.

But it is now settled that the plff. may according to circumstances have a new action of debt ag<sup>t</sup> the orig<sup>l</sup> debtor, or by scin facias a new writ on the orig<sup>l</sup> judg<sup>t</sup>: Now by stat 8 & 9 Wm 3<sup>d</sup> he may obtain a new execution on the orig<sup>l</sup> judg<sup>t</sup> without a scin facias: or he may undertake the party escaping on the orig<sup>l</sup> Ex<sup>t</sup> at C. L. so that he has a number of remedies. 1 Bac. 196. 206. 1 Sid. 330. 2 Mod. 136. 1 Vent. 4. 269. 3 Bl. 415. Esp. Dig. 611. Bull. et P. 69.

And where there is a voluntary escape of one committed on a return process, the orig<sup>l</sup> def<sup>r</sup> or party escaping may be retaken by the Plff. with what is called an escape warrant even tho he be in another state or part of the country. This warrant alleges the escape and directs his apprehension & return to prison; it is the only remedy in this case. 3 Co. 52. b. 2. With 245. Esp. Dig. 611.

But the off<sup>r</sup> suffering a voluntary escape



can never state the party escaping nor maintain any action agt him for escaping, he himself being participes criminis. The remedies in this case before mentioned are only for the plff. but for the off<sup>r</sup>. 3 Bl. 415. 3 Co. 52. 1 Cl. 330. 2 T. Rep. 176

And if an off<sup>r</sup> after having permitted a voluntary escape should afterwards state the party escaping, he is guilty of false imprisonment; for his authority over the party is ipso facto forfeited. 1 Vent. 269. Carter. 212. 2 T. Rep. 176.

And a bond to save the plff. harmless of a voluntary escape is void, as agt. law, as it would probably cause collusion between the parties & encourage escapes. the bond is void on the same principle that one to indemnify a murderer would be. 1 Pow. Con. 196. 7. 2 Bal. 213. 10 Co. 185. b.

But the off<sup>r</sup> in the process may state the party escaping, even tho he has permitted the off<sup>r</sup> to judge & recover part of his orig<sup>l</sup> demand, provided he has not recovered the whole from the off<sup>r</sup>. Ball. N. P. 69. Esp. Dig. 611.

But when the escape is negligent the plff may state or have an action on the case agt the party escaping. & this immediately, i. e. before he has been subjected himself or sent for the escape. for he is himself liable instantly, & undid might otherwise his remedy by delay. Cro Eliz. 237. 53. 3 Co. 52. b. 1 Bac. 45. 6. Esp. Dig. 612. 613.

And if a bond has been taken to indemnify the Shff for a negligent escape. he may take his remedy on the bond for it is lawful & he is not party crimini.

10 est. 157.

But the shffs bailiff cannot at C.L. have an act agt. the party escaping. tho he subjects himself by it to the shff; for he is not liable to the shff in the law at all, not being a known public off. This contract with the shff not being admitted as evidence agt. the party escaping is of no avail to him. The conviction of the bailiff is thus in theory a hard one, but not so in practice. for he might I suppose see the escapee in the name of the shff & the court of Ch. W. compel the shff to permit it on security given not to abuse the name. Cas. 88 349. Esp. Dig. 613

And in

Con. it has been determined, that the party escaping may be retaken by virtue of an escape warrant in another state. 1 Root. 107. So in N. York John. Vol. 4. In Con. it has been also determined that bail may be thus taken.

1 or 2 Con. & Rep.

If a person arrested on criminal process escapes he is punishable with fine & imprisonment & if he commits prison breach he is guilty of felony by C.L. I believe this is disused here by consent, and I do not recollect any prosecution for prison breach & the Eng rule is not in force in Con. 4 Bl. 129. 130. 2 Hawk 122 128.

If a Shff having arrested a felon suffers even a negligent escape. he is guilty of a misdemeanor & pun-



ishable by fine: but for a voluntary escape in such case, he is guilty of felony or punishable as an accomplice after the fact. 2 Bl. 130. 1 Hal. P.C. 570. 2 Hawk. 134.

And this whether the offender was actually committed or under a bare arrest. But the off<sup>r</sup> is not punishable till sentence passed ag<sup>t</sup> his delinquency: <sup>but</sup> before conviction of the principal offender the officer may be fined & imprisoned as for a misdemeanor. 2 Bl. 130. 1 Hal. P.C. 588. 9.

When a Sheriff has been compelled to pay debts or damages to a Plaintiff for a negligent escape, he may recover against the escaper by indent. ag<sup>t</sup> as for money paid & indent. ag<sup>t</sup> for his use. And it is a general rule that if one pay money for another he may have this action. And it has been decided in Eng. in one or two cases at Chancery, that where the Sheriff had been subjected by a voluntary escape he might have indent. ag<sup>t</sup> ag<sup>t</sup> the escaper. & Henry has since decided differently. See moot question Esp. Dig. 612. Parker, Ca. 146. La. 18. 2 D. Rep. 154. 156

In case of a negligent escape when the Sheriff sues the escaper on fresh suit & before an action is bro<sup>t</sup> ag<sup>t</sup> himself, his own liability is discharged. The words fresh suit here tho always used are determined to be negative, for if the recaption be at any distance of time or place, before an action is bro<sup>t</sup> ag<sup>t</sup> himself it is on fresh suit. Esp. 611. 2 Bae. 247. Sta. 907. 3 Co. 44. 52. 2 D. Rep. 126. 1 Inst. 211. 217

1 Root. 106. It must however be pleaded specially in Eng.  
2 T. Rep. 126. Secus in Ct.

But if the act is bro<sup>t</sup> ag<sup>t</sup> the Shff for an escape before recaption, a subsequent recaption does not discharge him; for the Shff by committing an act ag<sup>t</sup> the Shff. (where the act is well founded) has attached in himself a right of recovery. It is a general rule, that he cannot be defeated by any act of the Shff. Cro. Eliz. 657. Sta. 873. Co. 9. 657. 3 Co. 44. 152. 1 Roll 808.

Indeed it seems immaterial by what means the party escaping is restored to custody before the act is bro<sup>t</sup> ag<sup>t</sup> the Shff. for if it be done any how the Shff is discharged. It has been determined that a voluntary return by the prisoner before the act bro<sup>t</sup> is suff<sup>t</sup>. it being equivalent to recaption or fresh suit. Cony. Rep. 554. 2 T. Rep. 126. 1 B. & P. 413.

In case of a voluntary escape on the other hand, recaption is no excuse for the Shff. who has no right to state, that right being vested solely in the Prif. recaption cannot avail the Shff. because he cannot hold the prisoner without incurring false imprisonment. He is in fact considered as participes criminis. 3 Co. 52. b. Esp. Dig. 611. 12

Besides another principle prevents recaption. a pledge or right of custody once voluntarily relinquished or suspended is abandoned forever: like a lien on chattels, if once lost, it is so forever. Now in this case does the voluntary return of the party escaped avail the Shff at all: but he



is liable from the moment of the voluntary escape & the  
Plff's right of act<sup>n</sup> ag<sup>t</sup> him is complete. 2 Will. 294  
Salk 271. Esp. Dig. 612.

As well a subsequent assault by  
Plff in the action brings a voluntary escape. He may  
there sue the Shff or retake the party. Esp. 612. Salk  
271. But if the escape is negligent the Shff may  
for his own security retake, even after action bro<sup>t</sup>  
ag<sup>t</sup> him.

I have observed that after a negligent escape  
the Shff or gaoler may retake the party - but if after  
this the prisoner is discharged by the Plff as to the debt  
or damages, the Shff or gaoler cannot retake him for  
his own fees; the he might have retaken him before  
the discharge. The officers lien on him is lost by the  
loss of the person, & by his own fault, tho' not with his  
consent. His fault is a mere tort tho' no real crime  
& accordingly is only punishable as such by these  
means. The. 905. Esp. Dig. 611.

When a prisoner hav-  
ing the liberties of the goal yard escapes, or retaking on  
fresh suit or a voluntary return by the party es-  
caping before the action is bro<sup>t</sup> ag<sup>t</sup> the Shff, dis-  
charges the Shff. In such case if the Shff has  
a bond of indemnity from the prisoner, he may  
recover on it even tho' he is not himself liable to  
Plff. However as he suffers nothing from the Plff he will  
recover but nominal damages. 1 Root. 106. 127.

The Shff in  
such case may insist on taking a substantiated remedy ag<sup>t</sup>

the bondsmen, i. e. debt & damages. This he may do by refusing to take him after his return; but in this case he is liable over to the Plff for the whole. 1 Root. 128.

And when the Shffs liability to the Plff is barred by the state of limitations he cannot recover full damages ag<sup>t</sup> the orig<sup>t</sup> Shff on the bond of indemnity. He can it is true recover nominal damages, but if by the stat he is not himself fully liable, he ought not certainly fully to recover. 1 Root 151. 128.

And if judg<sup>t</sup> is recovered ag<sup>t</sup> bondsmen before the recaption, *condicta gnuera* lies. 1 Root 157. For the object of the bond is to indemnify the Shff ag<sup>t</sup> the claim of the orig<sup>t</sup> Plff, and in this case suppose that claim is barred.

In suing a Shff. for an escape it is our established rule, that under a count for a voluntary escape the Shff may give in evidence a negligent one: So also & for the same reason he may plead to the count for a voluntary escape a retaking on fresh pursuit & this he may plead without traversing the averment that the escape was voluntary; for it was impertinent for the Plff to allege it & no way necessary to his action. The Shffs plea is *prima facie* good & if he demurs it will go for the Shff. The Plff is here to avail himself of the distinction between voluntary & negligent escapes by making a novel assignment, as replication in answer to any de-



fines that may be made ag<sup>t</sup> a negligent escape.  
 It is by the way extremely unnecessary to set  
 forth a voluntary or negligent escape in the  
 count. for in the Dec<sup>n</sup>. you have nothing to do  
 with any distinction between voluntary and  
 negligent escapes. 1 Kent. 211. 217. 2 Bac. 248.  
 2 S. Rep. 126

I have observed already that for a volun-  
 tary escape the under shff. dep<sup>t</sup> or gaoler who per-  
 mits it is liable as well as the shff. If then the shff  
 sees the under shff. the shff it seems is discharged.  
 This rule Esp. lays down on his own authority only  
 & tho. doubtful to some from that circumstance  
 yet it is correct on principle Esp. Dig. 612

If after an  
 action brought ag<sup>t</sup> the shff for an escape & before  
 plea pleaded, the judg<sup>t</sup> on the orig<sup>l</sup> action is re-  
 versed, the shff may plead nil tunc record & thus  
 defeat the action against himself. For the judg<sup>t</sup>  
 on which the action ag<sup>t</sup> the shff was founded  
 is annihilated by a subsequent one. But if shff  
 recovers ag<sup>t</sup> shff & has Ex<sup>m</sup> & after this the o-  
 riginal judg<sup>t</sup> is reversed, yet the judg<sup>t</sup> for the  
 escape remains good & cannot be impeached,  
 for it is neither erroneous nor void. The remedy  
 of the shff there is a writ of audita querela by  
 which he shows that for this matter ex post fac-  
 to, (the reversal of the orig<sup>l</sup> judg<sup>t</sup>) the Ex<sup>m</sup> is un-  
 just. 8 Co. 142. 3 b. 1 Hob. 209. 2 Bac. 248 3 Mod. 325.

A voluntary escape occasions a forfeiture of the Sheriff's office if he hums it: a negligent one does not. And the reason is that the former is a crime the latter a mere civil misfeasance. Salk 272. 3 Lev. 280 2 ib. 81. 3 Mod 146. 2 Bac. 240. 2 Hawk. 136.

False returns & certain miscellaneous rules

If a Sheriff makes a false return on a process he is liable to an act. on the case in favour of the party injured. Ex. return of service on Dep't. when there has been none. Dep't. may sue him & recover all damages. Esp. 615. 1 Wils. 336.

In Con. when a false return is made the Dep't. in the action is at liberty to falsify the return by plea in abatement & thus defeat the action. In Eng. this could not be done by C.G. for this official <sup>act</sup> can then only be falsified by an act. instituted for the purpose. And it follows that in Con. if the Sheriff is thus defeated he may maintain an act. ag't. the Sheriff for the wrong & recover the damages arising from loss of the act.

By the C.G. as well as our own if Sheriff makes a return immediately disadvantageous to Plaintiff he may in all cases have an act. ag't. Sheriff as in case of a false return of non est, which is injurious only to Plaintiff. false returns are generally considered at C.G. as injurious to Dep't. only. Civ. Eliz 729. 1 Stra. 650. Esp. 616.

With regard to the support of gaols & prisons, the C.G. makes it the duty of Sheriff to provide them, where therefore an escape happens there the insufficiency of the gaol, the Sheriff is



liable for it is his duty to provide & keep in repair the prison  
and reimburse himself out of the Co. 1 Co. 84. 1 Roll. 808

In Con. on the other hand gaols are built & repaired  
by the Co. and it is the duty of the magistracy as  
the executive officers of the Co. to build & keep in re-  
pair the gaol & to raise money by a tax to defray  
the expenses. and a mandamus issues if necessary  
to compel them to do it. If then an escape happens  
tho the insufficiency of the gaol the Co & not the Shff  
is liable, unless indeed the escape was facilitated by the mis-  
conduct of the Shff or gaoler. St. Con. 220. 223. 1 Root. 450

The remedy under our stat. agt. the Co. is by petition or  
memorial to the Co. Court. an action would not lie. &  
as the court is supposed interested the party has in all  
cases a right of appeal to the supt. court. St. Con 367. 8  
1 Root. 158. 155. 275. 278. 357. 450. 505. 2 ib. 39.

But by a  
course of decisions the liability of the Co is in most cases  
only nominal. tho these decisions may, properly be  
questioned. Thus it has been determined that if the  
party is able to pay the Shff must resort to him &  
if not able the Shff has really suffered no damage  
and the Co is merely liable for special damage.  
Kimb. 318. 1 Root. 126. 155. 278. 357. 505.

Now I do not see  
the principle on which these decisions are made. the  
original C.L. liability of the Shff is transferred to the Co. and  
it would seem that the same rule ought to apply in both

cases. However if the debt at the time of escaping was of ability to pay the debt, but by the escape was enabled to evade the claims I suppose the Co. on the old principle been laid down would be subjected to the whole claims. And it has been determined that the Co. was not liable if the party was rescued from the prison by outward force, when the prison was otherwise strong enough to secure the prisoner. This seems to me bad law. 2 Robt. 196.

If a creditor voluntarily discharges from custody a debtor taken in Ex<sup>te</sup>. he cannot afterwards retake him, or otherwise enforce the judgment against him, whether he was actually committed or not, for those artificial reasons, that the process of the body is deemed as satisfaction for the time being, and the creditor having elected what is deemed his highest remedy must abide by it, and if he voluntarily relinquishes the lien the debt is extinguished forever. 4 Bur. 2482. 7 T. Rep. 420. Str. 653. 623. 1 T. Rep. 557. 6 ib. 525. 8 ib. 123.

And tho' the Sheriff the Ex<sup>te</sup>. was to discharge the debtor on consideration of a new promise to pay the judgment debt and the promise is not fulfilled, still the rule is the same. Sheriff cannot retake, nor maintain debt on judgment. He may however maintain an action on the new promise, for which the discharge was a good consideration, the Sheriff has a right to discharge altho' it would be a crime in Sheriff to do it. 4 Bur. 2482. 1 T. Rep. 557. 6 ib. 525. 7 ib. 420 2 East 243.



But the ~~104~~ will remain discharged in such case even tho the new agreement should be defeated afterwards for informality & in this case the P<sup>l</sup>ff is rem-  
edied. 1 T. Rep. 557 lib. 525.

And an ex bond conditioned for rendering again in Ex<sup>te</sup> a person once taken & discharged by P<sup>l</sup>ff is void as ag<sup>t</sup> law. it is a bond for false imprisonment. the case is the same as if the P<sup>l</sup>ff had taken the bond - it is a bond for false imprisonment the pledge is abandoned. (It has been improperly determined otherwise in Com. 2 Root 133/ 2 B & P 242. 2 East 243.

If two joint debtors are taken in Ex<sup>te</sup> and one is discharged from custody, such release is a discharge of the whole debt ag<sup>t</sup> both. of course the other may be discharged by Hab. corp. On the principle that a release of a prisoner is a discharge of his debt or obligation according to a former rule but as he is bound to pay the whole it is an extinction of the whole debt. 3alk 574. 4<sup>th</sup> Rep. 690. Cro. J<sup>o</sup> 551 1 Font. 93.

But under the law now ext<sup>t</sup> the holder of a bill or note having taken an indorser & discharged him from custody without actual satisfaction, may sue another & imprison or the drawer or maker or acceptor and discharge them successively for these are not joint nor joint & several debtors each one being bound distinctly severally & independently by separate covenants. 2 Bbl. Rep. 1235. 4 T. Rep. 825. 3<sup>rd</sup> Bbl. 115. 124.

It was formerly decided in Eng. that if a sole Def<sup>t</sup> imprisoned an Ex<sup>t</sup> and in prison the debt was forever discharged - this was partly on the ground that the Ex<sup>t</sup> having elected the highest remedy must abide it partly on a quaint application of some scriptural doctrine. 2 Bac. 354. Hob 52. Cro Ely. 850. Cro J<sup>n</sup>. 136. 143.

Tho if one of two joint debtors thus imprisoned & died, the debt as to the other was never supposed to be discharged. 5 Co. 86. Cro. Ely. 850. Cro. J<sup>n</sup>. 136. 143.

And now by stat. 21 J<sup>n</sup>. 1 which appears from its phraseology to be declaratory of the language of it being "it is declared & claimed & enacted" that when a sole Def<sup>t</sup> dies in prison, the debt is not discharged but the Plff<sup>t</sup> may run out a new Ex<sup>t</sup> ag<sup>t</sup> the estate as if there had been no prior Ex<sup>t</sup> so that the old decision of the courts seems to be overruled by the legislature, by a legislative exposition of the C. L. 2 Bac 354.

A penal bond by prisoner to Plff<sup>t</sup> conditioned that the obligor shall remain a true prisoner until the debt, fines & expenses of board are paid, is wholly void as ag<sup>t</sup> the stat. 23 Hen. 6 c. 11 & the statute of ease & favour which stat. provides that a penal bond to the Plff<sup>t</sup> by a prisoner for any other purpose than to remain a true prisoner is void to prevent extortion by Plff<sup>t</sup>. on the ground that a recovery on such bond must be of the whole penalty which is commonly double the sum due. In Com the bond was held void only in part 1 Root 158. 1 Vent. 237. 1 Pow. 309. 1793. 1 P. M. 175. 10 Co. 100. Plow. 68. Hob. 14. 2 Wils 351. 2 Bac. 461



By the way I doubt much whether it would not be good policy to consider the bond good in toto in this state & in every other where the penalty can be executed, the state arose in consequence of the then existing mode of recovery of whaler. But in Con a penal bond is precisely the same thing as a single bill and that would be good even in Eng. for debt. ~~pro~~ so that the Eng principle of policy would not prohibit the bond here there is no danger of oppression.

In the conclusion of this title I would cursorily notice some state regulations of Con. which are unknown to C.L. regarding gaols & gaolers.

I would premise however that at C.L. all persons committed to prison are bound to support themselves there, except attainted felons, then being deemed incapable of doing it and their property being forfeited indeed it would be inhuman to extend the rule to them. Plow 68. 1 Mod. 132. 12 Mod. 685.

43. our law a person committed for any offence is to bear his own expenses as to support if of ability & his estate is subject to it if he has no estate he may be assigned in service. But in criminal cases the expense is first paid by the town or state, and the town or state may then have an action against his estate. for the Sheriff is not bound to look up the estate & enter a return to recover the expense. 44. Con. 233. 365.6

The saving of more than double fees from the prisoner subjects the prisoner to double damages at the suit

of the party its firm at discretion of the Co. court. H. Con. 221.  
365.

But the by C. G. every person committed to prison is bound to support himself as he can. yet in Eng. there is a stat. called the *hoads act* & a similar one in our state, by which it is provided, that the prisoner committed in civil process to support himself unless he is admitted to the *poor prisoners oath*, this being the only legal evidence of his inability. the amount of the oath is that he has no estate of free, \$17 value in property sufficient to pay the debt on which he is imprisoned if less than \$17 except property exempted from Ex<sup>em</sup> and that he has not conveyed it away to defraud creditors. He is then to be liberated unless the Plff furnishes a weekly maintenance or to be lodged with the gaoler, the amount of which is to be adjusted by the Co. court. H. Con. 365. 1 Rost. 117.

But a prisoner admitted to this oath & supported by a credible affidavit to pay the Plff if he had estate at the time or acquiring any afterwards and an alias Ex<sup>em</sup> or a *scire facias* may be issued to compel it. 1 Rost 58.

But while on or discharged his body is not liable to an arrest for the same debt. As to notice of arrest to be given to the state. If on the hearing no cause is shown for continuing him in prison the oath may be administered by any magistrate of the Co. H. Con 365. 6.

If prisoners application is unsuccessful he cannot make a second application to a single magistrate but he may obtain



a review of the decision by applic<sup>n</sup> to C.J. of C.C. & a justice of the peace or to two justices quorum unus. and on the other hand if he is discharged on the first applic<sup>n</sup> the creditor may apply to the same two magistrates who may order the maintenance to cease which under the matter is stat.

On the matter being administered the charge of prisoners support lies on the creditor, but it is essentially changed on the prisoner for if the creditor procures the prisoner can make discharged to the end of time except on pay<sup>t</sup> of the orig<sup>l</sup> debt & there expenses of support.

Our stat. further provides that debtors & prisoners not to be lodged in the same room. When any Co is substitute of a gaol any person liable to imprisonment may be confined in the next adjoining Co. gaol. H. Con. 366.

As a respective Co. courts have authority to order to the walls all persons committed on Ex<sup>n</sup> for debt damages, fine or costs, except when the Ex<sup>n</sup> issued by the Sup<sup>r</sup> where the Sup<sup>r</sup>-court has the same authority. The Sheriff is bound to obey this order when given (the Inver Knew an instance) & if he does not he is ipso facto guilty of a voluntary escape & thus liable although the prisoner be not actually an escapee. this rule however does not extend to cases where the debt does not exceed \$17. H. Con. 365.





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# Contracts

The true contract as understood at C. L. is an ag<sup>t</sup> between two or more parties on sufficient consideration to do or not to do a particular thing. On principles of gen<sup>l</sup> law and the orig<sup>n</sup> nature of the thing the consideration makes no part of the contract, but by C. L. it is absolutely necessary to the existence of a contract and therefore it is included in the definition.

2 Bl. 442. 1 Pow. 647.

The true contract in its gen<sup>l</sup> acceptance includes as well ag<sup>t</sup> execut<sup>d</sup> such as prof<sup>s</sup>, grants, leases as those which are executory as covenants, promises &c. for in both cases there is a consent of the parties to an agreement respecting some property or right which is the subject of the stipulation, more usually however it is used to signify such agreements as are executory. 1 Pow. 7.

As a contract is an agreement there must necessarily be an assent of the parties to it, & this assent is of the essence of the contract, there can be no ag<sup>t</sup> without mutual consent & of course no mutual obligation can be created or discharged without it. 2 Bl. 442. 1 Pow. 7. The first inquiry then is.

Who may assent to a contract. And here it is observable that a person who is non compos mentis, as an idiot or lunatick cannot regularly make a binding contract. the reason is that wanting understanding in judg<sup>t</sup> of law he can have no will. & of course



no capacity to assent or dissent. In grant therefore contracts not of record entered into by such persons are absolutely void. 4 Co. 123. 126. 2 Roll 728. 1 Pow. 11 & 12.

Since if an idiot or lunatic is a particular-  
-tenant with contingent remainder over, a sur-  
render of the particular estate by him does not destroy  
the contingent remainder, as it would if he were  
capable of performing a legal act, the acts of an  
idiot being void. Talk 576. 3 Mod 276. 301. 3 Lev. 284  
2 Vent. 198. Carth. 211. 250. & 35.

Whether void or void-  
able depends on the  
nature of the act. I never  
think the weight has  
been thrown in  
favour of their being  
voidable only. 1878.

Whether the deed of  
an idiot or lunatic man is factum can be pleaded  
is not settled by the authorities. It is I think well es-  
tablished that such deed is void & not voidable & it  
would seem that hence the plea spoken of would be  
good. It is not however an universal rule that to  
a void deed non est de may be pleaded for it cannot be  
pleaded to a power of estate made by an infant which  
is strictly void. 1 Pow 11. 12. 4 Co. 87. Esp. Dig. 223  
Talk 675. 4 Co. 123. Sta. 1104. Bull et al. 172.

But persons  
of this description are capable of receiving property by a  
derivative title as by gift, grants, devise & descent,  
because says Mr Pow. there is a presumed assent  
on their parts to whatever contracts are intended to be  
beneficial to them. This is an unnatural & incon-  
gruous reason for the law is made to presume an assent  
in persons whom it always presumes incapable of vo-  
lition. I should say that the law dispenses with an

spent in such cases for such gifts, grants &c being in common presumption advantageous to them, the law allows them to take without that assent which is required in other cases. 1 Inst. 26. 1 Pow. 12. 13. 3 Bac. 84. 2 Kent. 203.

If an insane person or one who never has understooding & then agrees to the purchase, his assent becomes binding on him; but if he die during his insanity or recover his intellects & die without agreement to it, his heirs may avoid it if they please: for they shall not be bound by the contracts of a person incapacitated or without the power to contract, it being

But the contracts

of an idiot or lunatic to alienate his property or to create an obligation on himself, come within the genl. rule i.e. they are void. no other contracts of his than such as his purchases are voidable, the rest are strictly void, and may be avoided by his heirs.

As to those however it appears to be the rule of C.J. that the party himself cannot on recovering his understanding take advantage of his own incapacity. As if a lunatic were to give a bond or note, he could not himself plead non est factum to, or otherwise avoid it during his life time, for no man of full age shall be permitted to stultify himself. In fact altho the contract is regularly void yet he cannot avoid it himself by a plea of non est factum. The authorities differ on this point but this seems the prevailing opinion. Cro. Eliz. 398. 622. 2 Co. 123. Lit. sec. 405 1 Pow. 14. 26. 1 Fent. 41 to 43. Contra. 2 Kent. 198.



Sta. 1104. B. & P. 172.

Now this rule may appear a very arbitrary one since the contract is absolutely void ~~and~~ <sup>and</sup> be ~~not~~ <sup>at</sup> liberty to avoid it. It appears founded on a supposed reason of policy for the prevention of frauds by persons of insanity in fact however the cases are very rare in which this fraud could be effected.

3 Bac. 87. 4 Co. 124.5.

This point has arisen in *Con. and* <sup>been</sup> carried to the court of errors. it was then determined that a person may ~~over~~ <sup>over</sup> his own insanity & thus avoid his contracts 3 Day 90

And at C.L. after the death of the insane party his heir or Ex<sup>r</sup> may over his insanity & thus avoid his contracts. Now I do not see that there is any more danger in allowing this plea before his death than after it. 4 Co. 124.5. Cro. Eliz. 398 3 Bac. 87.

And thus are two modes in which his contracts may be avoided during his life at C.L. 1<sup>st</sup> after office found on a writ de idiotia inquiring into or limiting the King as p<sup>er</sup>son p<sup>er</sup>son or the supreme Execution of any state may by *seim facias* avoid his contracts during his life. such as his gifts grants & other acts in p<sup>er</sup>son. & this office found has relation to the commencement of the disability and affects all contracts made after that time. This office found is a species of verdict or issue taken in a particular manner prescribed by law. Inst. 40. 4 Co. 126, 61 8 Co. 170. 3 Bac. 88.9 1 Pow. 24 to 37

2<sup>dly</sup> A writ may be bro<sup>t</sup> in Ch<sup>l</sup> for the same purpose by the Ch<sup>l</sup>. Just. or by the committee of the lunatic if he has one & in that way his contracts may be set aside on the ground of insanity during his life the lunatic however is not, neither can he be a party in either case. these are then the two methods of avoidance during the life of the lunatic, at C. L. but neither at law or Eq<sup>l</sup>. can he over his own incapacity himself. 2 Vin 414. 3 Wm 185. 111. 3 Attk. 170 1 Eq. Ca. 279. 1 Pow. 267.

But if a suit in Ch<sup>l</sup> is bro<sup>t</sup> in favour of the lunatic to compel performance of a contract made with him, <sup>whole same</sup> he must be made a party & the suit be in his name tho he must appear by committee as an infant does by guardian for the suit is not bro<sup>t</sup> to over his insanity or for him to take any advantage of his incapacity at all, but to enforce his claim against another 1 Cha. Ca. 153. 1 Pow. 28. 29.

If a lunatic makes a contract in a lucid interval he is bound by it & so are his representatives, for he has the power of volition & is able to contract. Dyer 203. 4 Co. 125. a. 2 Vin 412. 414. 3 Bac. 89. 1 Pow 29.

And both lunatics & idiots are bound by acts & contracts of record, as by fine levied or com<sup>mon</sup> recover<sup>y</sup>. suffered, these are not voidable by the party himself or his representatives or indeed by any one. It would be an enormous ag<sup>g</sup>. the record & a total natural impeachment of the judg<sup>t</sup>. The presumption of law as to his capacity is irresistible. he being of full age. 1 Inst. 247. 10 Co. 42. 414. 3 Bac. 88.



By the way an idiot can never have a lucid interval, he is what is called a natural fool. Obviusly a person of no understanding from his birth he can never acquire any. And it is said in the C.L. books, that a person who has any understanding, whatever, as to know his own name his parents, the days of the week or to count 20, is not an idiot, he may be non compos so that his contracts would be void, yet he is not strictly an idiot at C.L. 3 Bac. 79. 1 Bl. 303. 4. Fitz. 233. (tho he might be an Chaucery post)

A lunatic is one who has had understanding but has lost it from some supervenient cause, from the nature of the affection then a recovery is not impossible, indeed it is most usually probable. 1 Inst. 24. 4 Co. 125. 1 Bl. 304.

Intoxication, tho operating as a temporary insanity, is not of itself a Law or Eq. a ground on which one can avoid his contracts. He is what Lord Coke calls, voluntarius demon & the Law shows him no indulgence. The principle of this rule is not that a person absolutely bereft of understanding is capable of contracting but that he shall not be permitted to avail his incapacity. 2 P. W. 131. 1 Ky. 19. 2 Lw. 262. 1 Pow. 29. 30. Contra. B. N. P. 172. Raw. 429

The rule then is really that intoxication is not of itself a sufficient cause to avoid contracts made at such times. But if one party draws the other into a state of deep intoxication, for the purpose of procuring a contract

from him. a court of Eq<sup>t</sup>. will set the contract aside on the ground of the fraudulent conduct of the other party. 3 P. W. 131. 1 Pow. 30.

A party's being of weak understanding is not per se a suff<sup>t</sup>. reason for avoiding his contracts, unless the party were non compos. for neither the C. L. nor the rules of Eq<sup>t</sup>. distinguish between the subordinate degrees of wisdom & weakness in the minds of men; if they did it would be impossible to decide upon the validity of any contract. The only distinction recognized by law is between minds, compos & non compos. same & non same. 3 P. W. 129. 1. F. m. 56. 63. 65

But in Eq<sup>t</sup>. if any fraud or imposition is practiced upon a man of weak mind, that Ct will regularly set the contract aside. And if then an circumstance warranting a suspicion <sup>as that the con. is extremely improvident the char. being proved</sup> of fraud, relief will be granted, for when such men are parties, they are so manageable that the fraud may be so conducted as make detection difficult or impossible. 2 Pow. 228. 3 P. W. 129. 1 Pow. 31.

On the same general principle of want of capacity to assent: The contracts made by infants except for necessaries are regularly not binding & even those for necessaries frequently are not. The exception is founded in necessity only & no other principle. for they have in judgment of law no discretion whatever, no physical power to contract. see "Par. & Ch"



A person cannot be also in <sup>gu</sup> in a state of agreeing to a contract, not from any want of physical power but from his moral or legal inability. Hence his contracts with his husband or himself <sup>gu</sup> speaking. I affirm and now that the true reason does not consist so much in this moral or legal inability, but in the want of property by virtue of the coverture, or of legal power to control it, and the husband's intervening rights. see "Husb & Wife" 1 Pow. 59. qd. 112.

If a tenant in tail agrees to alienate his lands he is bound by such a grant tho it be to the disinherison of the heir or his issue in tail. the court of Ch. will compel him to levy a fine or suffer a recovery for the whole inheritance is in him & remainders in tail are not favoured. 1 Ch. Ca. 171. Pow. 112.

Besides this there are various <sup>other</sup> cases in which a person of legal capacity may not only bind himself but ~~also~~ <sup>also</sup> by his agent to contracts. Thus a cestui que trust may bind himself & the trustees by an agreement to which the trustees are not parties tho the whole beneficial interest is in the cest' trust. The nominal or legal title is in the trustees but they have no interest in the estate they are a mere conduit pipe, and a court of Ch. will compel them to perform the agreement. 1 Ch. Ca. 173. 208. 1 Pow. 112. 113.

A trustee may also in some cases bind the estate of the cestui que trust by his own agreement. Thus if a trustee who has the legal title & all the evidence

of the legal<sup>title</sup> makes a conveyance to a bona fide purchaser who has no notice of the other party's interest. this bona fide purchaser will hold to the exclusion of the existing trust. for the purchaser is not to be affected by a secret right of which he had no knowledge or means of knowledge, and this risk must always attend such conveyances when there are no records kept to exhibit the transfers of property as there are in Conn. Ohio &c. 1 D. Rep. 735. 747. 163. 8 id. 516. 1 Am. Bl. 334. 447. Pow. Mort. 295.

So an ancestor seized in fee may, by an agreement to alien his property or estate bind his heir. So that if the ancestor dies without fulfilling the agreement, a court of Eq<sup>l</sup> will compel the heir upon whom the legal title descends to make the necessary conveyances. The reason is obvious, at the time of making the contract, the legal & beneficial estate was in the ancestor both at law & in Eq<sup>l</sup>. the heir had no title, so that the purchaser's title is prior to the heir's & of course better than his. 2 Vern. 213. 1 Pow. 115.

On the other hand if a tenant in tail agrees to convey the inheritance and dies without executing the conveyance his issue are not bound by the agreement neither can they be compelled to convey. for altho their title is thro the orig<sup>l</sup> tenant in tail or ancestor, yet they claim independently of him per form and dour, and altho he might have doct<sup>d</sup> the entailment, yet as he has not done it, his agreement will not deprive his issue of



their legal rights. 1 Ch. 238. 9. 2 Vent. 350. Hob. 203.  
 Pre. Cha. 278. 2 Vy. 634. 1 Bro. 125

But if on such an agreement his issue had received the consideration, they may be compelled to execute the agreement by making the necessary conveyances after his death, for if they take the benefit of the agreement they must execute their part of it. 1 Ch. Ca. 171. 1 Pow. 126.

There are certain cases in Eq. in which a parent may make a contract binding upon his minor children, for which I would refer you to "certain exempt cases in Eq." in the title of "Parent & Child."

So also the contracts of a woman made before marriage, bind during coverture the husband whom she afterwards marries, for as he takes a great part of her property absolutely and all control over the rest at C.L. and as his rights suspend her sole liability, he must be liable on such contracts, on the principle that he takes the wife cum onere. "Husb & Wife" 2 Vern. 448. 1 Roll. 351. 10 Mod. 160. 2 Ld. 1 Pow. 123.

Genl. speak-  
 ing the contracts which a man makes are after his death binding upon his Ex<sup>r</sup> & adm<sup>r</sup> for in the genl. rule of law the Ex<sup>r</sup> & adm<sup>r</sup> of every person are implied in himself, by operation of law therefore they are genl. bound by contracts even tho' not made. [I say generally, for there are fiduciary contracts which not being transmissible are

not within the rule.} On the ground that the Ex<sup>rs</sup> are his representatives for the purpose of collecting what is due to & discharging what is due from his estate.

2 P M<sup>o</sup> 197. 1 Pow. 128. Rees. 493

On the question how far and in what cases an ex<sup>or</sup> or agent may bind his principal see "Masters & Sons" for the gen<sup>l</sup> rule of law see. 1 Pow. 128  
3 P M<sup>o</sup> 277. 2 Vin. 127.

If a joint tenant agrees to alien his part of the estate, but dies before performance, the survivor cannot be compelled to perform it, but may take the whole by survivorship, because his title to the whole commenced at the inception of the estate, so that his title to the whole was prior to that of the party claiming under the agreement; to a part, 2 Vin. 63.

It is said to be an exception to this rule when the agreement amounts to a severance in Eq<sup>l</sup> of the joint estate, but she has no rule or case to determine what such agreement, and 2 Vig. 634. 1 Pow. 129.

The assent of a party to a contract may be either express or tacit, or as commonly termed implied.

The express assent is one declared by some sign which is intended to signify it, as by writing speaking or gesture even. And this assent may be either precedent, concomitant or subsequent to the principal act. Thus if money be delivered to a servant to purchase goods or he be employed to do it on credit the master's assent to his contracts is previous.



If a man agrees to purchase & pay for a horse at the same time his agent is concurrent. If a servant or a stranger even without authority buys goods for another & then afterwards appears to the contract & ratifies it. he is bound by this subsequent agent.

Express or implied agent may arise in several ways. And first, an agent to a contract may be implied from mere silence or inaction. Thus if a prior mortgage is present while the mortgagor is contracting for another mortgage on the same subject & knowing that the contract is intended as a subsequent mortgage, is voluntarily silent making no disclosure of his own claim: he loses his priority on the ground that he impliedly appointed to a postponement of his right. 2 Vern 151. 1 P. W. 393 1 Vern. 370. Pow. Mort. 185. 1 Vy. 6. 1 Bro. Cha. 357.

It is true that in this case the first mortgage might be postponed on the ground of fraud, his conduct amounting to a negative deception, but there is no necessity of resorting to this reason, except as against infants.

And then on several examples of this kind the same rule applies as well to cases as mortgages. 2 Vern. 239. 1 Eq. Ca. 355. Pow. Mort. 183 185. 2 Vern. 150.

But to raise an implied agent in the person thus affected by it, it is necessary not only that he should have known that his claim would interfere with such subsequent contract, but his silence

must have been voluntary. if he were seized into silence  
the presumption of his assent could not arise. 1 Pow. 134  
135.

And it is a general rule that the law will raise an  
implied agreement, when necessary to give effect to  
some principal contract founded on an express a-  
greement. as if I sell all my timber trees growing  
on my land. the vendor by virtue of the implied  
or tacit ag<sup>t</sup>. has an implied & express to carry them  
off. So if a chamber is let the lessee must have an  
implied & express. so if an acre of land is conveyed  
to another which lies in the middle of the farm. in  
these cases the implied assent is necessary to give ef-  
fect to the original contract. 1 Inst. 56. 2 Bl. 35. 1 Pow. 136

There is one species of tacit agreement annexed to  
all contracts whatever. viz. that if one party fails  
to perform the part he has agreed to perform, he  
shall pay to the other party all damages sustained  
by the non performance & this is the principle on  
which damages are claimed on all breaches of  
contracts. 2 Bur. 1011. 3 Bl. 166 1 Pow. 137

one usually employs another to trade for him on credit  
under a general authority, he tacitly agrees to accept  
contracts of the same kind the other may make  
in his name 1 Pow. 138. "Masthead."

In every case of  
proffment. sale or surrender. gift or grant &c. there is a  
tacit assent presumed on the part of the purchaser



unless the contrary appears. As if a deed be executed while he is in Europe & delivered into the proper officer for <sup>or to a third person for his use</sup> record, <sup>him</sup> although it may appear to be in the conveyance, still it is good until he does. If a trespass be committed before his return an action for it may be supported in his name, for his title is good to all intents from the time of the conveyance until he avoids it. By descent, the rule is the same with respect to devises & all purchases in deed. 2 Leon. 233. 3 Co. 26. 7. Stra. 165. & Day 398.

The rule is the same as to the heir at law who is presumed to accept property descending to him. & it is no defence to trustees for injury done immediately on the death of the ancestor, that the heir had not assented to the inheritance. 1 Pow. 139.

A husband is presumed to assent to many contracts made in his name by his wife. see "Husband & Wife" —

Upon the sale of a personal chattel as a horse, there is always an implied warranty of title in the vendor, unless the contrary appears. As if A sell a horse to B & it turns out that A had no title to him B shall recover back the consideration, but there is a warranty of title, there is not of sound qualities. 3 T. Rep. 57. Esp. Dig 632 1 Fent. 109. 373.

We are next to enquire what circumstances will invalidate an assent actually given.

There can be no contracts without mutual assent. & generally speaking such assent to contracts makes them binding. But there are cases in which the contract is void or voidable and of course not binding altho the assent is actually given.

Thus ignorance or error will in some cases invalidate or destroy our actual assent to a contract & particularly if the mistake of our party as to his rights were occasioned by the fraud or deception of the other party. *Rees 425.6.7.*

The contract is said by some to be void in this case on account of the fraud & the language is correct enough. But it is the proof of the fraud which disproves the fact of a legal or binding assent. Thus when an heir was induced to believe that a will which disinherited him was valid, and for a small consideration to release his right to the estate. The will proved invalid & Ch. R. relieved w<sup>g</sup> to the release. In point of fact actually assented to a relinquishment of his rights w<sup>g</sup> it was this ignorance, under the impression that he had none. *1 P. W. 239. 1 Vern. 19. 4 Vern. 534. 1 Pow. 140.*

But on a doubtful point of right, concerning which both parties are ignorant on which side it lies no contract by which the party having the actual right is a loser, is binding. for there is nothing here which vitiates the legal assent actually given. it is a contract voluntarily entered into with full knowledge that one must lose. it is nothing more than a compromise.



between litigant parties. as in case of disputed title to land, there is no exception it is intended as a bargain of hazard to prevent the whole loss falling upon one. it is then a fair contract & good both at law & in Eq. 1 P. W. 726. 2 Atk 587.

But if the party in title is ignorant of the extent of his right, as Mr. Poulton says it. & of the means of informing himself, he is not bound by his contract. now by ignorance of the extent of his right must be meant ignorance of the value of the property contracted about, for certainly ignorance of law cannot be averred. as when a daughter in consideration of a bequest of 10,000 £ released her orphanage of the value of which she was ignorant amounting in fact to £40,000. the release was relieved against in Eq. 3 P. W. 316. 1 Pow. 145. 2 ib. 200.

I would here notice an case which appears always to be recognized as good law, which is very difficult indeed impossible to reconcile with principle. it is that of *Lansdown v Lansdown*, where both parties were deceived by another person in point of law as to the rights of each. a compromise ensued which Eq. set aside. the question was whether the estate descended to the elder or younger brother. the schoolmaster decided in favour of the younger. because estate descended & not ascended *quasi per descensum*. there was no fraud & a great rule is that no account of ignorance of law is to be admitted. I get that was the only ignorance in the case. 2 Pow. 196. Mos. 364. 2 East 469. Rev. 425.

Wagering contracts are in genl. binding at C.L. and it is not essential to the validity of such a contract that the event on which it depends, should be in itself contingent, it is sufficient that it be equally uncertain to both parties. ignorance does not invalidate the agent. Coup 37. 2 T. Rep. 610. 3 ib. 673. 5 Bar. 2802.

Thus a wagering made upon the existence of a present fact is not invalidated by ignorance, as to the fact whether there is such a particular expression in the test of Williston.

There are also cases in which the agent of an intended purchaser of an estate is invalidated by an erroneous representation respecting the circumstances or qualities of the estate, <sup>which appears to have been the principal question to the contract</sup> tho there is no fraud. There has been much room for the application of this rule in our country in consequence of the great land speculations. Thus suppose one contracts for land as a mill seat & on survey there appears to be no water or none that answers the purpose. he is not bound for the object of the contract has failed entirely. I am supposing a case in which there is no fraud if there were fraud the room for relief would be much greater. 1 Ky. 400. 2 Vern. 185. 1 Vern. 32. 1 Pow. 149. 2 id. 200. 202. Or suppose one to purchase land for the site of a dwelling house on survey it be found covered with water as a Lake. the contract is not binding for he is no agent when the real state of facts. Reeve 424

But in the other



hand, if the mistake relates to a particular which appears not to have been principally in the contemplation of the parties at the time of the purchase, it will not avoid the contract, and if purchaser has suffered any loss he must recover in an action for damages. 1 Pow. 148. g. I am selling a farm not purchased on account of the timber, & giving a mistaken receipt of the timber without fraud will not invalidate the contract, for the purchaser would be compelled to pay the consideration, and he must sue for difference of value. And Lord Eglington most easily enforces such contract with rather equitable deductions. Brev. 426

But if the contract is made on a particular condition that the subject shall possess certain qualities or incidents their absence will invalidate the contract. 1 Pow. 150.

And in some cases the intention of the parties as to their assent may be inferred from circumstances. as where one described a female slave in habits of a male & sold her as a male, the contract was void for the purchaser never assented to the purchase of a female.

And according to Mr Powell if an unsound horse be sold for a pinner he would only be worth when sound, the want of assent may be inferred from that fact & the contract be void. I do not see how this objection should ever have found its way into the work of so accurate an author as Powell.

it is wholly without foundation in principle and is  
 foreign to all law. there is not the least resemblance of  
 law in it. 1 Pow. 150. Contra. Cowp. 818. Doug. 33. 1 T. Rep  
 133. 3 T. Rep 757. Peake Ca. 115. 123. 2 East 314.

Now the  
 principle laid down by Lord is so far from law, that  
 by C.J. the purchaser cannot recover a farthing  
 by way of damages unless there is fraud. the max-  
 im of the law is "caveat emptor" Thus suppose a  
 horse sold, which dies so soon after as to prove that  
 he must have been diseased at the time, but that  
 fact was unknown to both parties. if there had been  
 a fraudulent representation or concealment, or sugges-  
 tion false or a suppression veri the seller would have  
 been liable. But in this case there was neither and  
 the contract is good & binding -

In Con. it was for-  
 mally held that the pay<sup>mt</sup> of a sound price implies  
 a warranty expressly against the C.J. rule. I contended  
 against this decision for 15 y<sup>rs</sup> & when I had occasion  
 to make use of it the court deemed it to be law.  
 ser. 2 Root. 407. 2 Swift 120. 160m Cont. 2 East 314. Paley 123.

We have now con-  
 sidered the nature & effect of assenting to contracts, & the prin-  
 ciple rules relating to the invalidation of assent. We are  
 now to examine.

The subjects of contracts, or the  
subject matter contracted about. And here the in-  
 quiry is in relation to what subjects, contracts may be  
 so made as to bind the parties.



now here I would premise that there is a distinction in law between contracts executed and contracts executory. I shall not at present define & examine the distinction particularly, it belonging to another part of the title, but merely observe that the following principles may be more easily understood. That an executed contract is one which passes a right or interest together with immediate possession, an executory contract on the other hand, is one which creates a right or obligation, but is never attended with immediate possession. it is introductory to an executed contract.

Now no person can by contract executed convey a thing in which he has not at the time, an actual or potential interest, for one cannot convey in present that which he has not. Plow. 432. Hob. 132. 1 Inst. 309. b. 1 Pow. 152.

The subject of an executed contract there must be one, in which the party executing it, has an actual or potential interest at the time. So that if one should make a bill of sale of all the wood, or wheat, which he should purchase before a certain time, the sale is void for in such cases there is nothing for the sale, gift, grant &c to act upon, it is unc. & there is no interest by which the contract imports one, so it is unc. in present of what has not.

So if one joint tenant, during the life of his cotenant, conveys away the whole estate, & afterwards survives the other cotenant.

the moiety of the other does not pass by deed. the survivor had no right to that at the time of executing the contract & the ~~in afterwards~~ becomes ~~become~~ <sup>with the last</sup> & his and imports to convey the whole (yet he retains the one moiety <sup>beant.</sup>) 1 Pow. 160.

And on the same principle if A sells a horse to B on condition of paying a certain future time. the vendor A. cannot make a valid sale of the horse to another before the time of payment arrives. & such second sale would not be good even if B did not pay according to agreement. for A at the time had neither interest, property or poss<sup>n</sup> of the horse. Plow. 432. 1 Pow. 154.5. 1 Inst 41<sup>st</sup> She 817, 75. R. 537

And can a man make a grant in present of a subject in which his right is inchoate, to vest in future. as if a contingent remainder be limited to A on his marriage. if he attempts to convey it & then marries. the contract is not binding upon him. it is a conveyance <sup>in present</sup> of an estate not at the time his. Whether it <sup>should</sup> be enforced in Ch<sup>l</sup> as an Ex<sup>l</sup> contract or as evidence of one we are not here to enquire. We are considering contracts according to their effect in courts of C. L. 4 T. Rep. 248. 1 Pow. 155. Dyer 221. 1 Pow. 135. Fomb. 202. 3. 9.

But a thing of which one is the potential owner at the time, i. e. some thing accessory or incidental to, or arising out of another <sup>vested</sup> at the time in the party making the conveyance, may be the subject of an executed contract. Thus although we have above stated as concerning an



of all the wood that can stand purchase in a given time is void? yet a conveyance of all the wood that shall within a given time grow on my farm is good so of grass &c. because the grantor has already the subject out of which the interest contracted about is to arise, the wood &c. is an accessory incidental thing in which he is said to have a potential interest the transfer of which the law recognizes as good Hob. 132. 1 Pow. 156.7

So too a present grant or sale of the future offspring of our cattle or animals, is good so of the feathers shall grow on our geese. the distinction in these cases is very obvious.

But on the other hand rights not actually or potentially vested may be the subjects of Exec<sup>y</sup> contracts, which are only stipulations precedent or preparatory to the act by which the interest in question is to be conveyed. In this there is no incongruity. for one may well covenant to convey all the land he shall own 5 years hence. But to say I do grant you now all the land I may own 5 years hence, is a legal solecism, and would be as outrageous as the conveyance of something not in existence. a man therefore cannot convey in present that which he does not either actually or potentially own at the time. But he may obligate himself to convey in future what he may in future acquire. Thus one may covenant to purchase wheat of A. & to convey it to B. So A may authorize

to make lease for a limited time of all the lands of which he shall be seized on such a day. In all these cases of Ex<sup>ch</sup>. contracts, and agreements that regard a future interest, there is always something future necessary to be done to carry the agreement into execution. Bac. Max. 79. Pow. 158. 9.

But <sup>when</sup> a contract is so made regarding a future interest, that no future act is necessary to be done to give it effect, it is not valid for it must take effect if at all as an executed contract which cannot be for a reason before given. An instrument regarding a future interest will not be valid, altho couched in executory terms if in its legal effect it is to operate as an executed contract. Thus a covenant to stand seized to the use of another of all the lands he shall purchase is invalid the word covenant is strictly executory, but to stand seized is a common assurance & it operates as a present conveyance and no future act is necessary to make it complete and give it full effect as a conveyance. 2 Bl. 523. Bac. Max 80. 1 Pow. 234, 160.

But the contract executed cannot as such convey a future interest, yet it may bind or transfer a future interest by way of estoppel. the contract will prevent the party from using the defence that he had no interest at the time, and it deprives him of the right to give that in evidence, as if he should mortgage an estate & covenant that he is well seized when he is not, but after



wishes to acquire a good title, he is then estopped to say that he had no interest by the covenant and the mortgagee has as good a title as if the interest had been <sup>an</sup> indefeasible title at the time. His interest arises out of a rule of evidence by which it is precluded from availing that he had no title. Salk 276. Pow. Mort. 495. 6. 97. 2 Vern. 11. 1 T. Rep. 760.

The rule is the same as to leases. If I lease to you to day a farm that I do not own & then I acquire a title to it and enter the covenant of seisin in the lease, I am estopped to say that I had no interest at the time as an all persons claiming under me. Salk 276. Pow. Mort 415 416. 2<sup>d</sup> Rep. 729. 1048. 1550. 3 T. Rep. 370.

But an inchoate interest in a leasehold remains so until the conveyance by means of a mortgage or lease. This is well established the apparently inconsistent with the doctrine given.

appears to be the same in relation to an absolute freehold conveyed with the usual covenants of seisin upon the same principles, the doctrine will hold for the covenant is an estoppel. 2 Br. 295. ditto. 446. Co. Lit. 265. 3 T. Rep. 370. 1 Pair. Com. 160. 1 Root 222. There is however no precise example except in Com. Reports.

But if one makes a conveyance in present of that in which he has no interest at the time without such covenant of seisin, there is no estoppel & the contract is not binding in any manner, and the contractor can aver that he had no interest at the time, and in every instance in which there is no estoppel, the general rule of law must have its full effect, it and of itself only.

Requisites of a contract. The first is that it be possible of performance, 2<sup>d</sup>. that it be lawful & 3<sup>d</sup> that it be certain. All contracts thus to be valid must be possible lawful and certain. by the latter requisite is meant merely that it be definite & intelligible.

It must be possible that is in performance, for no right can be acquired, nor any obligation created, by a contract the performance of which is impossible, this is the decision of law & common sense. such a contract is nugatory and may be considered void on the ground of intention. as if a man should contract to travel with the velocity of the rays of light, on this subject it is a maxim that the law never compels a man to do what is merely void or nugatory or impossible 1 Inst. 206. 1 Roll. 20. 1 P. 160. 1. 178.

Thus if one covenants to make a proppunt of lands covered with the ocean, or to travel from London to Rome in a day, such contracts are void from their impossibility of performance, & no damages will be given for the non performance. so if a man covenants to suffer a non suit when there is no such action depending. 1 Inst 206. Peake 735.

But in the application of this genl. rule the law distinguishes between acts in themselves or in the nature of things impossible, and those which are not so, & are merely impracticable to the party con-



travelling, contracts of the latter class are not void. For if a person not worth a cent covenants to pay a million within a month, or suppose a man contracts to sell an estate belonging to A. now he cannot convey it unless he can purchase. that however is a thing not impossible in itself and if the contract is not performed damages are given. It is true indeed that Ex<sup>ts</sup> will not enforce a specific performance of the contract for that would infringe the rights of third persons, 2 L<sup>d</sup>. Ray. 1165.

2 Bro. 161.2

There has been made a peculiar kind of contracts made by way of practice on ignorant men which appear to have perplexed the Eng. courts very much, as when a man covenanted to deliver two grains of rye on the monday following & so on progressively doubling the quantity on each monday in the year, so when one agreed to pay for the horse a penny for the first nail in his shoes & so on in geometrical proportion thro the thirty two nails. These contracts were not in themselves physically impossible, in these cases the court held that the promisor, having contracted beyond his ability, such impossibility should not avoid the contract and that he should pay for the consideration that he had received, and the rule they took was to give the Pl<sup>ff</sup> the value of the articles sold as of the horse in the latter case, now this was setting aside the contract altho the court did not propose to do that, for when a thing is not delivered at the time the rule of damages is the value of the thing at the

time appointed for delivery. So that the court considered the contract absolutely void. Indeed I see no difficulty in considering it void on the ground of fraud in matter of fact, in science indeed but not of law. The express contract then being void the case stood as if there had been no contract. & the Def<sup>t</sup>. was adjudged to pay by virtue of the implied contract, the full value of articles received. 2<sup>d</sup> Ray. 1164. 1 Vent. 269. 1 Q. B. 111. 1 Will. 295. 1 Keb. 569. 1 Pow. 162. 3. 2 Pow. 159. Russ. 436

As to the gen<sup>l</sup>. rule of damages above mentioned. which by the way is made to operate in favour of Plff who suffers by Def<sup>t</sup>. non performance. see. 2 Burr. 1010. 1 Fent. 224. 1 Pow. 408. Stra. 406. 2 East. 211. 2 Vern. 394. Plff must be indemnified if the value rises after the time of <sup>the value at</sup> trial gives the rule of damages.

A contract is not void on the ground of impossibility unless the performance is strictly impossible. I do not consider the two contracts just adverted to void on the ground of impossibility. The distinction between a near and remote possibility <sup>of performance</sup> is not regarded in law. Thus if A with a numerous offspring covenants with B. that all his land shall be conveyed to him if A dies without <sup>issue</sup> him tho the chance be very small as one in a thousand, yet the covenant is binding and may be enforced in Eq<sup>y</sup>. For the question is not whether the performance or happening of the event be probable: but is it possible? in the case of the contract for the houseborn recited.



And if a man covenants to do a thing by express & absolute contract, which is not in itself impossible but which is incident to him, and by inevitable accident even as the act of God, still he is bound. Thus a master of a vessel in London covenanted & expressly without qualification to be at Winyaw in S<sup>c</sup> Carolina at such a time to take in freight and it was agreed by all that the voyage might be made within the time. The master sailed in season but adverse winds rendered the performance impossible, it was held notwithstanding that the contract was binding, and the covenantor was considered as a virtual insurer against the risk of failure. He should have acquainted himself with the probabilities, and not made a covenant thus unqualified. This must be the rule in the construction of contracts or the point will be left vague without any decisive rule which would leave too much to the discretion of juries. 3 Bar. 1639. 1 Fent. 366. Day. 289.

If this covenant had been impossible in the nature of things as to perform the voyage in three days I take it Def<sup>t</sup>. would not have been so and for the contract would have been void.

II. A contract to be valid must be lawful, and if not lawful it is void? for clearly no one can be bound in law to do an act that the law prohibits or to refrain from doing a thing which the law requires.

If a contract is against law it is strictly void and not merely invalid and liable to be avoided

Now a contract may be unlawful & void when it is to do an act that is malum in se or which is malum prohibitum.  
1 Row. 165. 1 P. W. 189

Of the first kind are all contracts that have for their objects the commission of some act that is prohibited by the law of nature or reason or used by the moral law as theft robbery &c. or any violence or fraud whatever. So that if a bond, or any promise either parol or written should be entered into to pay a man a sum of money if he will kill or rob another, it is void. 1 Hawk. 113. 1 Font. 213. Corp. 39.

In the next place contracts are void when they have for their objects something which the act of the natural or moral law, yet is contrary to the municipal law or laws of the land

A contract may be against the municipal law in either of three particulars. 1<sup>st</sup> as repugnant to the public welfare which is of course opposed to the policy of the law. 2<sup>d</sup> as against some maxim or principle of the common, unwritten or customary law. & 3<sup>d</sup> as against some positive statute regulation 1 Row. 166. Corp. 139  
1 Hen. Bl. 322. to 327. 2 Wils. 341. 3 T. Rep. 17. 7. 23 7. 1. 545  
8. 1. 89. 1 B. & P. 272

In the first place then all contracts of which the object is a general restriction of a man's trade are void as against law, being opposed to the



policy of the law & the welfare of community. And indeed it is a general proposition that all contracts that militate against national policy are void, and a contract not to exercise a particular trade as a mechanical one or <sup>not</sup> to pursue a useful study belong to this class and are void. 24 Llyn. 63. 1 Hen. Bl. 322. 7 T. Rep. 522. Corp. 39. 8 T. Rep. 87. Oct. 211.

And the rule is the same as to contracts the object of which is a general restriction of the exercise of a trade <sup>trade</sup> for a limited period, as not to exercise a useful trade for a year, for the law will not distinguish between long & short periods, and the rule of good policy prohibits a restriction for a year as well as for a life Cro. 536. 7 T. Rep. 523. 1 Inst. 206 1 P. W. 181. 1 Pow. 167.

So if a husband and wife should covenant not to cultivate his farm for a limited period, it would be void as against the public welfare. 11 Co. 53. 6. 1 Pow. 167.

But an agreement not to exercise a particular trade at a particular place may be good, for such contracts may be beneficial in preventing inconvenient and hurtful competitions and promoting a proper & useful distribution of tradesmen throughout the country. Cro. 576. 2 Bl. 136. Palm. 172. 1 Pow. 167. 8.

But a contract of the latter sort is not binding unless it is on sufficient consideration, there must not only be a consideration must it must be an adequate one, and

the onus probandi lies upon him who attempts to enforce the contract, for the presumption is against such agreements, the law regarding them with regard to the fact of a sufficient consideration is not to be presumed as it would be in case of bonds. *Str.* 739. *Palm.* 172. 1 P. W. 181. 192. 10 Mod. 27. 85. 130.

And it appears to be immaterial in the application of these rules whether the trade one engages not to pursue is his own trade by profession &c. &c. the validity of the contract depends, as before stated, in either case upon the generality of the restriction and the sufficiency of the consideration. 1 P. W. 192. 1 Pow. 169.

The principle in this case is that no man ought to preclude himself from engaging in any useful trade, and however improbable the event may be the law will not allow of such restrictions.

On the same principle of policy, a bond or a contract of any kind, for what is called unlawful maintenance is void as against law. It is opposed to the public peace & tranquillity. It is an unlawful upholding in lawsuits which amounts to the offence of barratry. *Cart.* 229. 2 Inst. 212. 4 Bl. 135. 1 Pow. 173.

In gen<sup>l</sup> also a contract with an alien enemy is void upon the same gen<sup>l</sup> principle as against the public welfare, on the ground that any mercantile communication with a public enemy may endanger the public safety, hence the subjects of belligerents cannot contract with each other.



2 Bull. 173. 1 T. Rep. 85. 5 id. 648. 1 Nov. 173

And in the same principle a policy of insurance upon the property of an alien enemy is void. The in point of form it is made with the enemy for it promotes the commerce of the enemy & gives our citizens an interest in the safety of that commerce. I am sure that this rule has been questioned on the ground that the interest of the insurers and perhaps the probable profit & loss might justify a parliamentary alteration but I am not adequate to the examination of this subject. It is manifest that the tendency of such a policy has just been correctly stated. 8 T. Rep. 548. 6 id. 35. 1 B. & R. 345 1 East 96. 4 75. Doug. 238

But the rule that contracts with an alien enemy are void, is not universal. It is settled by the law of the civilized world that ransom contracts, or as they are called ransom bills are obligatory. By a ransom bill is meant a contract by which a captured party agrees to pay the captor a certain sum on condition of release, and the master of a ship may by such a contract bind his owners as well as himself 3 Burr. 1734. 1 Bl. Rep. 553. Doug. 619.

The immediate jurisdiction of these contracts is vested in the courts of admiralty & not in the courts of C. J. the question of the kind may incidentally arise in these courts. Marsh. In. 432. 37.

And ransom bills have been enforced where the hostage has died for you will do

now that it is customary for the ship master to have two or three of his men as pawns or hostages.

And it has been once decided that the ransom bill was good altho the cable was taken with the hostage. this was determined in the time of L<sup>d</sup> Mansfield in a court of C. L. before the admiralty had obtained the immediate jurisdiction of these matters, which by the way was but 15 or 20 years since. — ib. anc.

And indeed with regard to the genl. principle of such contracts, I conceive that all contracts arising out of a state of hostility, altho made with an alien enemy, yet as tending to mitigate the evils of war are binding, that is they may be notwithstanding the state of war or the relation the two nations have to each other. It is on this principle that treaties of peace, agreements for the exchange of prisoners, treaties are made Doug. 625. 6.

But at this day ransom bills are prohibited by 22<sup>d</sup> Geo. 3<sup>d</sup>. a bill for this purpose was introduced into Congress the fate of it I have not learnt. The rule in Eng now is that an Englishman may take a ransom bill, but cannot give one. Mar. Ins. 432.

On the same principle marriage brokerage bonds as they are termed are void as opposed to the public welfare. there are bonds which are given as a reward for bringing about marriages or for influence used for that purpose. they are considered as very vicious, since they



tend to the disturbance of domestic tranquility, & encourage imposition, falsehood & deception for the purpose of effecting a most important contract. 1 Fern. 245  
1 Burr. 474. 5. 3 Edw. 411. Esp. Dig. 184. 1 Pow. 174. 190.

And not only bonds but notes, bills of exchange &c contracts of a similar nature are all subject to the same rules, &c. &c.

I have now given you the leading instances of contracts which are void as opposed to the public welfare. We are now to consider those which are void on account of their repugnance to the maxims of the unwritten or common law. for in general all contracts which are opposed to the maxims or principles of the law are void, referring now particularly to the unwritten law.

Thus if a consideration which is the cause of the promise, or the promise itself is opposed to any of those principles, the contract itself is unlawful & void. 1 Buls. 38. 3 Salk. 97.

Thus a promise made to a merchants clerk or to any agent of the merchant in debt, in consideration of his fraudulently discharging a debt due to his principal is void, for the consideration is a fraud upon a third person, and of course opposed to the first principles of the common law, the promise in itself is not illegal, but the consideration corrupts & vitiates the contract. 1 Pow. 176. 3 Salk. 97.

And on the other hand to illustrate that part of the rule which

relates to unlawful promises. If a Sheriff for a valuable consideration promises to permit an escape, the contract is void, for altho the consideration is good yet the promise is illegal. An undertaking as to pay money is in the abstract unlawful but takes its character from the thing promised undertaken or stipulated to be done. The rule would be the same in relation to a promise or obligation for by way of indemnity to Sheriff to suffer an escape, the promise in the abstract is not illegal, but as the consideration is so, the contract is void. 10 Co. 76. 102. Cro. Eliz. 199. Dyer. 356 1 Pow. 176

On the same principle a promise by a minister of justice to do an unlawful act in his office, or by a third person to indemnify him for doing it, is void as against the principles of C. L. Cro. Eliz. 230. 1 Pow. 176

But still when the unlawfulness of the consideration whether the fact which makes the consideration unlawful is unknown to the promisee, a contract of indemnity founded on it is not unlawful, but may be binding. Thus if a Sheriff makes an arrest without proper authority and procures a promise of indemnity, or third person to assist him in securing & keeping the prisoner, if the third person is subjected for the false imprisonment, the Sheriff is bound on his promise of indemnity to remunerate him, that is provided the third person has spoken even is innocent of the fact that the Sheriff acted without the proper authority, for otherwise he would be participes criminis. Stat. 53. 1 Pow. 177.

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So if B. in Ex. agt. Ct. directs the Shff to take the goods of B. alleging them to belong to A. & which the Shff does not know to be actually B's, upon a promise of indemnity, such promise will bind A. for altho the consideration is unlawful, yet the Shff did not know the fact. besides if the property had proved to have been Deft's (viz A's) the Shff would have been liable for not buying upon it.

So too if I hire a man to cut timber on my land. I am bound to indemnify him for all damages he sustains for cutting them in trespass but by another whether I expressly engage to indemnify him or not. For the case see, 1 Pow. 178. Cas. 3d 652.

Upon the same great principle, all contracts, the objects of which militate against the laws of morality & decency, are void as against the maxims of the law. Thus a wagering contract as to the sex of the great Chiodin Dion was held void as leading to indecent disclosures, and could not be enforced without indecent witness. besides being an <sup>unlawful</sup> injury to the feelings of a third person. a wagering contract you will observe is not of course void at C. L. Cowp. 39. 729 735. 2 T. Rep. 610. 3 ib. 693. 1 Pow. 233. 183.

And all contracts made for any corrupt purpose as in effect to bring about bribery, are void. altho not in form contracts of bribery, thus for a candidate to bet with a voter on the result of an election or with one who is influential in the

appointment, or with a judge. ~~(on the opposite party)~~ as to the result of a trial. all such contracts are void as tending to bribery or corrupt influence. Comp. 39 1 Pow. 182.3. 4

So also a wager made as a cover for usury is void for this as well as every other subterfuge which ever entered the mind of man has been used to for this purpose. Thus to bet that the money lent would not be returned in such a time. 1 Pow. 184.

So a wager as to the mode of playing an illegal game is void as tending to promote the practice of it. 2 New. Bl. 43. 1 BR. 56

But tho a wager with a judge who is to determine a cause, as to the result of it is void for usury above stated, yet a wager between the parties to it are not, for it cannot be presumed to influence them. Comp. 37. 1 Pow. 184. 5.

And as a general rule wagers by Eng. C.L. are binding, as they are in several of the states. The policy of this rule has long been questioned by many eminent men in Eng. as such contracts are but a species of gambling ruinous to individuals and of course hurtful to the community. But the decisions on this point are too stubborn to be easily overruled. 1 Pow. 146. 22 L. 610 3 L. 635.

But in Con. all wagers are made illegal by statute. Our courts had before determined this to be our common law. & it probably would have been even if not for the statute. But our statute goes further and provides that all money-



increasingly lent, at the time place & for the purpose of gaming, as horse racing he shall not be recoverable back, H. Con. 361

All contracts entered into to defraud third persons are universally illegal and void. in- and then are viewed at C. L. as the most vicious of all contracts. As a contract between two settlers & a contractor who took a composition for the forage of horses not kept, so that the spoil was divided between them. Doug. 433 or 450. 1 Pow. 185. 2 Pow. 165. 176. Salk. 156 4 T. Rep. 106. 1 Am. Bl. 322. 656. 2 T. Rep. 763. 1 Brod. & P. 95 286

And then are contracts that can never be ratified the parties cannot confirm them nor can they be the consideration of a future promise.

On the same principle a private agreement between one of the parties to a marriage with the person who furnishes the portion, to convey it is void as a fraud upon others. As of a parent with his father, it is a fraud upon the wife & her friends and it cannot be ratified. Sta 240. Esp. Dig. 184

And no agreement to pay an for attending an auction by way of puffing as it is termed, to enhance the price of goods is binding. it is void as a fraud upon the bidders, or State Trick, 1 Pow. 186 & it. anc.

III On the subject of illegality of contracts those prohibited by stat. law are also void. Thus an agreement to pay more than the rate of interest allowed by law

on annuities contracts. 1 Pow. 166. 188. 1 T. Rep. 736.  
12 Ann. Stat. 2. 11. Nov. 46.

So also a secret agreement by a bankrupt or his agent to pay money to a creditor for signing his certificate is void as ag<sup>t</sup> the St. 5 Geo. 2. as was the case in N. S. where we had a bankrupt law. and I should think such an ag<sup>t</sup> would be void at C. L. as a fraud upon the other creditors by depriving their average and it is bribery. In the case of Ramsey & Blake in Conn. it was determined that such an agreement made to induce a creditor to compromise & release the debtor on his paying all his creditors paid paper was void. and in Eng there is a stat to this effect. Long 675. 696. 1 Pow. 189.

Under this head there is little occasion to particularize. for when a stat. declares a particular class of contracts void. it is only necessary to bring the case within the class.

I have further generally to observe on the illegality of contracts. that all such are unlawful & void as stipulate for the omission of legal duty. as by a Dep<sup>t</sup>. Shff note to execute process of a certain description. Vol. 12. Moore 886. 586. 1. Pow 145

The rule is the same as to contracts which tend to encourage unlawful acts or omissions, tho the agreement does not expressly stipulate for such acts or omissions. as a bond of indemnity to a printer against any indictment or action to which he might be subjected by publishing libels or the like. altho there is no express stipulation



for the performance of the unlawful act, yet it tends  
to encourage the commission. 1 Pow. 196

So too a bond to indemnify  
a Sheriff for imprisoning a writ or permitting an escape,  
altho the agent is not expressly unlawful yet the con-  
tract is void as tending to a breach of law.  
And it may be laid down as a general proposition  
that any contract stipulating to save one harmless  
in committing any offence whatever is void as  
against law. whether the thing to be done be a  
public offence or a private injury. 1 Pow. 196. 198  
1 Ch. 209. 10 Co. 100. b. no Ch. 353. 4

And also an agree-  
<sup>wager</sup>ment between two persons that one of them or any third person  
shall commit any unlawful act is void, because it is  
an temptation to the commission of it it being.

And the rule  
extends to contracts which operate as an incitement to the  
commission of any kind of immorality even such as is not  
forbidden by positive laws.

There is a distinction to be taken in the  
books as to bonds conditioned for the performance of  
several covenants of which some are lawful & some  
void by statute. and covenants some of which are law-  
ful & some unlawful by C. L. contracts or bonds  
of the first kind are void in toto altho some of  
the covenants are strictly lawful. 2 Wils. 351  
1 Vent. 237. 1 Pow. 199 1 Anne. 66. n.

But in the latter case when some  
of the covenants are good and some void by C. L. the

instrument will be void as to part and viz. as to the  
certain agt. C.L. and good as to the residue.

Therefore if  
a statute declares any thing to be unlawful a bond  
stipulating for the performance of that thing or inclu-  
ding a covenant declared void by statute, with other  
other covenants that are strictly lawful, is strictly  
void in toto. But if it contains several covenants  
part good or lawful & part void by C.L. the bond  
is binding as to the lawful covenants. Thus if  
an under Sheriff covenants not to serve process of a par-  
ticular description & also to save the Sheriff harmless  
for all escapes of persons arrested by him (the under Sheriff)  
the first covenant is void but the bond is good as  
to the latter covenant.

On the other hand If a Sheriff takes  
a penal bond for another agt. the spirit of N 3 Ann 6  
of ease of action. & also in another court occurs or at-  
tempts to recover a bona fide debt to himself, the bond  
is void in toto. because the first mentioned covenant  
is made so by Stat. 2 Wils 351. 2 Vent. 237. 4 Bac. 688g.  
1 Pow. 200

I have never yet seen in any book the least  
reason for this distinction. it seems to have been  
treated as a mystery and a positive rule of law  
and I was myself once much inclined to think  
~~that~~ that there was no foundation for it. The truth  
is the distinction does not arise from any supposed dif-  
ference in effect of a partial illegality by C.L.  
and by Stat. I trust the true reason is to be found



in the established phraseology & construction of state law. for when a state forbids contracts to be made or makes them unenforceable, & declares the bonds, notes, bills &c. the whole security, in effect to be void & then I can see the only true & satisfactory reason for the above distinction

And yet according to the rules laid down an illegal contract can create no right that can be enforced. yet after such a contract has been executed the law suffers it to take effect, by refusing aid to the law, <sup>who wishes</sup> to be relieved against it. Thus in the first place when the illegality is of such kind that both parties are deemed criminal, and at once the contract is rescinded that is the illegal act is done. he who has paid his money on the contract cannot recover it back. In cases in this case merely permits the contract to take effect. If the contract had not been executed it would have no force it merely stands neutral. so that "in pari delicto potior est conditio defendentis" Doug. 451. 468. Bull. ct. 3. 1812. Salk. 22. 8. T. Rep. 572. 1 B. & P. 9. 298. Comp. 790. 2 Burr. 1012.

Thus, A enters into an E. & P. agreement by which he engages to pay a certain sum, or convey land to B if he will smuggle certain goods for him. this contract cannot be enforced at law. But if A acting honestly as between himself and B has performed his parts of the contract, the law will not interpose in his favour after the smuggling has been done & force B. to repay, or convey, altho he received the money &c on this foul consid<sup>n</sup>.

Both in this case are equally criminal.

But while the contract remains executing on one side, the party who has paid money on it, may it is said recover it back, & this appears to be the established rule. Thus if A pays to B a sum of money for which B undertakes to commit some offence, as to beat C. now before the act is committed, A can recover back the money but if it has been committed he cannot recover it back. now this appears to me to be a palpable departure from the principles & policy of the C. L. Ball at P. 132: Doug. 471.

This distinction appears to me to be founded in mistake or misapplication of principle, without doubt the party ought to be able to recover in both cases or neither, for as the rule now stands by the weight of authority, it is plainly calculated to induce a commission of the offence, for if in possession of the money, performance of the act, will secure it to him. Whereas if it could be recovered back in both cases, i.e. whether he had performed it or not. Or if it could not be recovered back in either case, the covenant as to title to the money would not be affected at all by the performance, so there would be no inducement to perform the illegal act, for his liability to repay would be the same whether the act were done or not. I think from principle that the money ought not to be recoverable in either case. (See most questions). and this appears to be the policy of the law in other cases, to remove all temptation for the commission of offences. -



Money deposited upon an illegal wager & paid over with the consent of the loser cannot be recovered back. But if it has not been paid over either party, can recover from the stockholder the part deposited by himself, tho' the wager has been decided. For the first part of the rule see 8 T. Rep. 575. Doug. 696. 1 Bos. & Pul. 298. & for the latter part. 5 T. Rep. 405. 3 East. 322.

This latter rule has been denied, 11 Johns. 2126. where it was determined that money deposited on an illegal wager could not be recovered back in any case.

In all cases where money is deposited on an illegal wager, it may be recovered back before the wager is determined, tho' after it, it depends upon the fact whether it has been paid over. 1 Bos. 202. 206. 7 Bull. Ct. 132.

There is a case arising from these rules which appears unsettled. I mean the case of money deposited with the stockholder on an illegal wager & paid over by him to the winner after he was forbidden to do it by the loser the question was whether he could be compelled to pay it back to the party depositing. It appears to me that he could I do not speak now from weight of authority. The winner could not recover it of the stockholder I am sure after a prohibition & it is clear the stockholder could not retain it against the <sup>loser</sup> winner. for thus he might be enabled to cheat both parties, and there are some authorities which go in support of this opinion, but from an analogy & weight of authorities it seems that the party cannot prevent the stockholder from paying it over. 1 2<sup>d</sup> Ray. 89. 5 T. Rep. 409. 1 Bos. & Pul. 297. 2 Str. Bl. 64. 2 Bl. Rep.

1075. 2 Wils. 309. 3 East 322 favouring my friend. <sup>25.</sup> Esp. Dig. N.Y. Ed.  
 the broad ground is then taken that the loser cannot recover from  
 the stakeholder <sup>(because it is a civil wrong)</sup> much less from the winner after bet determined.

It has been determined in one case that money paid <sup>to one of the parties</sup> on an ille-  
 gal wage before made, may be recovered back after wage  
 determined. 7 T. Rep. 535. this is questioned 1 East 98. 3 T. Rep. 95  
 & negatived 2 John. 226. Still I confess I think a case  
 goes on the right principle viz. that it can be recovered back  
 in all cases. Still however it is not very important whether  
 it is to be recovered in all cases or none. In some by stat. wages  
 are recoverable in all cases. St. 361

It has been determined  
 again in pursuance of the first distinction that money  
 advanced in procurement of an officer might be recovered  
 back before the officer procured but not after.

So also money  
 advanced as premium on an illegal policy of insurance  
 may be recovered back before the risk runs but none after  
 Doug. 271. 1 Pow. 202. 6. 7.

I have thus far spoken of con-  
 tracts in which both parties were deemed ~~equally~~ crim-  
 inal. On the other hand when one party is not regard-  
 ed as participat criminal who has paid money on an illegal  
 contract, he may recover it back tho the contract is exen-  
 ted on the other side. This rule applies to all cases where  
 the law prohibits a contract for the protection of one party  
 against the other as in case of usury when if one has  
 paid an usurious premium he may recover it back.  
 the law makes usury criminal in the lender but not  
 in the borrower for whose protection the law was made &



who is supposed to be oppressed. it would be absurd to make his misfortune crimes. - Comp. 791. Doug. 451 or 671. Stra. 915. 1 Fomb. 218. 235. 1 Hen Bl. 65.

This rule was formerly otherwise. Salk. 22. but that is not law.

The rule is the same when money has been paid by a bankrupt or any of his friends to a creditor to get him to sign the certificate under a secret agreement. the stat is made for his benefit & the money may be used in debt. ap. it. sec. 1 Pow. 211.

But altho a contract stipulating for the performance of an illegal act is void. yet a security given, or promise made in consequence of a prior illegal act <sup>(by the same party)</sup> is not of course void. Thus if a person in an illegal trade has paid the losses and taken a security of the other to reimburse him his proportion of the loss. this contract or promise is binding, as in case of an illegal insurance. Steward on ship from the illegal contract. 1 Bat. 143 de.

I should observe here that this decision has been questioned tho I do not know that it has been precisely decided anywhere. 4 Burr. 2069. 3 T. Rep. 418. 2 Hen Bl. 579. Mats. Part <sup>147</sup> 147. See however 7 T. Rep. 630. 6 T. Rep. 61. 405. 2 Bosc. & Pul. 372. 3.

It has also been determined that if the whole loss has been paid by one partner with the <sup>more</sup> privacy & consent of the other and no express promise to refund made, still he is bound to repay on a promise implied in law. 3 T. Rep. 418. 422 This has been still more <sup>confirmed</sup> affirmed on appeal.

2 H. Bl. 379. 6 T. Rep 61. L. O. S. 7 ib. 630. 2 Bost. Pul 372.3.  
3 Vez. Anti. see next questions

If one of the parties in an illegal trade pays the whole loss without the knowledge or consent of the other, the other is not bound to rep. of his proportion, for there is no *quasi* contract, no special instance & request nor any contract implied in law. 2 H. Bl. 379. Marsh. Rev. 42.

If a person enters into a contract, the act of making which by him is made unlawful by positive law, he may be bound by it, tho he could not claim under it. Thus 21 Am 8. makes it an offence for a clergyman to trade, if then he should enter into an engagement of a mercantile kind, altho there is nothing unlawful in the thing stipulated, yet he being forbidden to make such stipulation could not enforce it tho he would be bound by it himself. He only offends as it was him the law intended to restrain, but not to give him an immunity or privilege. 1 Atk. 196. 199 Ch. Bills. 19.

So also if a person becomes a trader as a smuggler, <sup>or as person carrying on business of unlawful commerce</sup> namely, he is liable as a trader to the bankrupt laws & yet he could not avail himself of his contracts made in that line of business. 1 Atk. 199.

It is said again that if the object of any contract is perfectly useless or nugatory it is void & the law will not interfere to enforce it, as if one should contract not to comb his hair wash &c. the law will not suffer itself to be trifled with in this manner. 1 Pow 232



And a contract which wantonly affects the peace or interest of a third person is void; as, that a woman has committed adultery &c. So is a contract which has for its object the exposure of some moral defect of a third person. indeed such are generally malicions as well as wanton, as that a lady has no back teeth, or wears false hair or false teeth. Comp 729 735. 3 T. Rep. 447. 1 Pow. 232.

Having considered the second quality of a valid contract viz. its legality the now inquire concerning third requisite viz. that it be certain. That is the terms of a contract must admit of some intelligible construction. Thus if a contract to convey to B certain lands or goods in consequence of B's promise to pay him a sum of money in a short time, the contract is void, the time short being too vague, as nothing can be said to be short except by comparison. 1 Buls. 92. 97. Cro. Jac. 250.

But a promise to pay money generally without more is good, as it is construed to be payable presently. the promise is sufficiently certain, creating a present debt, which is of course payable immediately unless some future time is expressly agreed upon. 7 T. Rep. 427. 124. 1 Pow. 180.

But if one promises to do a collateral act, as contradicting from paying money at some future time he is bound by it. tho he is allowed his whole life to do it in: so that he cannot be subjected

to an action for the non performance, the only action that can lie is against his representatives. Thus an agent to make a loan at some future day, if the promisor dies without doing it the contract is broken & his representatives may be subjected. 1 Pow. 180.

But in relation to this rule requiring contracts to be certain it is a maxim, that id certum est quod certum reddi potest, i. e. what can be made certain by reference to a known definite standard or measure is sufficiently certain in judgment of Law. as if one contracts to pay the value of 1000 bushels of wheat this may be ascertained by reference to the market price. So too a contract to pay B such a sum for a certain article as C shall determine. Pop. 148. Cro. Ch. 194. 1 Sid. 270. 1 Keb. 56. 65. 1 Pow. 180.

### Of the nature & kinds of contracts.

All contracts are either executory or executed, a contract is said to be executed when the parties transfer property or rights to each other, together with immediate possession or with a present, indefeasible right ~~rights~~ of future property. In such contracts nothing binds the other, for the right of property & also of possession either immediate or future is supposed to be passed. Thus the contract is executed when the goods are sold delivered & paid for this is a transfer of property with an immediate actual possession.

So it is executed when there is a transfer of property & an indefeasible right



of future possession. as when a man has lands under some engagement & disposes thereof from the time such engagement ceases. they lands under a lease for years. 2 Bl. 443. 1 Pow. 175. 158.9. 234:5

Executory contracts are those by which no property passes in present, but which are introductory or preparatory to an actual future transfer or exchange of property. Thus A & B engage to exchange horses next week. So A covenants to grant or lease his lands to B. ten days hence. it is an e.

A contract then is executory, either when one party performs immediately & the other is trusted, or when neither performs immediately but each is trusted. This is the language of Mr. Powell. I conceive it would be more correct to say in this case that tho the cont. is ex<sup>y</sup> on one side yet it is execut<sup>d</sup> on the other. but in the latter part of the case it is ex<sup>y</sup> on both sides. Thus if A lends money to B on promise of repayment it is execut<sup>d</sup> on the part of A. but Ex<sup>y</sup> as to B. Again if A engages to make a house in future & B promises to pay for it in future. the contract is clearly ex<sup>y</sup> on both sides. Mr Powell treats both as ex<sup>y</sup> contracts. 1 Pow. 235.6.

I shall treat of the effect of this distinction more at large hereafter.

All contracts are either express or implied. this is merely another coordinate division. Mr Powell divides contracts into express, implication & constructive

Construction. this latter division of contracts cannot be distinguished from express contracts as I expect to show directly. An express contract is one in which each party stipulates in express terms, what is to be done or omitted. 1 Pow. 236.

A constructive contract as Powel says is one which is raised out of an express contract by construction & is different from what the instrument prima facie imports. now this is a distinction entirely arbitrary & unfounded. for there is no logical or legal distinction between express & constructive contracts. for a constructive contract it is nothing more than a division or branch of express contracts. for it is raised by construction out of the words or terms of the express contract.

Thus a recital in a deed of conveyance respecting the grantors interest in the subject amounts in construction of law to a covenant that he has the title as recited. now there is no difference in the nature of this & an express contract or agreement. Now if the deed or covenant is that "I am well seized" &c it is clearly express. But according to Mr Powel if the deed run thus, "wheras I am well seized" &c. the contract is neither express nor implied. but it appears to me that there is no difference and that if the contract is to be found in the language of the parties it is clearly an express contract. so that there is no sort of propriety in treating it as a distinct class. That such a recital is an express contract see Cro Az 137. 668. 1 Geo. 24. Ray. 14. 1 Leon. 122.



So also a verbal in a marriage settlement, that whereas it is to pay \$1000 as a marriage portion is holden to be a covenant or agreement that it will pay that sum. this Mr. Poul also turns in correctly a construction contract. 1 Pow. 238. 2 Eq. Ca. 652

Then an certain cases in which a clause by way of exception in a deed inducted may amount in construction of law to a covenant. on this subject I would refer you to the title of covenant broken. I will just mention however that if a lease is made by induction of a farm excepting a certain close amount to a covenant that the close excepted shall not pass. Cro. Eli. 657. 67. 11 Co. 50 b. 1 Leon 117. Carth 232.

So also a reservation of rent in a lease inducted amounts to a covenant on the part of the lessee to pay the rent, as if an inducted lease runs thus it leases & demises to B. yildain, paying & rendering rent. &c. Cro. Eli. 657. Stra. 407. 1 Vent 10. Cro. J. 399. Pop. 136. 7. 1 Call. 518. 1 Pow. 242.

So also a lease containing these words "without impeachment of waste" amounts to a grant of the trees growing upon the estate demised; to lessee and this Infers is what I call an implied grant. Hob. 132. 1 Pow. 243.

Implied contracts on the other hand are those which are not expressed in terms nor raised by construction from the terms used in the contract, but arise

but arise by operation of law out of the facts transactions or res gesta of the case. As if A requested B to work for him, the implied contract is to pay the value of the labour, from the fact of the request of labour & the performance of that request, the law raises the assumption out of the whole transaction.

So if one delivers goods to another for safe keeping or any other purpose, the bailor impliedly engages to take such care of them as the law requires. And that need be no express promise, nor need the contract be raised from the language used by the parties, but from the facts as they took place, 1 Pow. 246.6

These two classes of express & implied include all contracts known to the law.

If a Plaintiff raises money on an Ex<sup>ch</sup> the law raises a promise on his part to repay it to the Plaintiff in the action, this promise is not raised out of the terms of any express agreement but from the mere facts in the case.

And all these numerous class of actions called indubitatus assumptions are founded universally on this class of promises, or promises implied in law from the transaction.

If A grants the trees growing on his land to B, he by implication also grants to B. free ingress & egress to take them, this is strictly an implied contract or promise, not raised from any construction of the express contract, but merely from the fact of the grant.

Flow. 15. 1 Samsd. 322. 2 Bl. 36. 2 Bl. 36

And now since a strict



There are some contracts  
implied in Chl. which  
are not recognized at  
law. One of the strong-  
est is, if a freeholder  
lands having paid but  
not yet taken possession  
becomes underlet the land in  
his hands stands then  
for the residue with  
any express contract  
implying it. 13 Co. 11.  
42 Co. 4. 23. 2. 3. 2. 27.

tenancy at will, has been converted into a tenancy from  
year to year. If a lessee holds over his term, without any  
express contract, there is an implied ag<sup>y</sup> by lessee to  
a lease for a year, so it will be continued from year  
to year until due notice is given to quit, which is  
usually six months, in title "states less than freehold" or  
"states at will." 1 Pow. 135. 258.

There is such a vast variety  
of implied contracts, that a more full specification of them  
I must refer you to "action of assumpsit."

All contracts again are either absolute or conditional.  
Absolute is used as contra distinguished, from condi-  
tional & means, a contract by which one binds  
himself or his property absolutely & unconditionally.  
As if in consideration of a covenant to lease, one prom-  
ises to pay rent, or if in consideration of money ad-  
vanced, he engages to repay, or to deliver some  
chattel. 2 Bl. 252. 1 Pow. 259. 236

A conditional con-  
tract is one the obligation of which depends either  
altogether or in some respects upon some uncertain  
event, upon which it is to take effect or be defeated,  
be enlarged or abridged. 2 Bl. 152.

When the contract is to take  
effect or be defeated entirely by the event of the con-  
dition it is entirely conditional. When it is to be  
enlarged or abridged, the obligation undertaken or in-  
tended, it is partially conditional the condition  
not going to the entire contract. In both cases

However the contract is conditional. 1 Inst. 201. 2 Bl.  
152. 1 Pow. 259.

Thus if A agrees to purchase land on condition that B returns from abroad on such a day. the performance or obligation is suspended until the event determined. if he returns according to the condition the contract is absolute. if not the contract is at an end. is defeated entirely & neither party is bound by it. it aue.

Again if a promise is made to pay £100 on condition that he marries B by such a day the effect of the contingency's happening or not, is precisely the same as in the other case. before the day the event & the consequent obligation is altogether doubtful. but if A marries B by the term the obligation is absolute. if not the contract is at an end.

So also

if I covenant to pay you £100 on condition that you convey to me certain lands by such a day. If you fulfil your part. your right to the money is absolute & you may demand it immediately. if you do not convey by the day. I am discharged. it aue.

In these cases the contract is wholly conditional. but there are cases in which it is only partially so. Thus if A sells goods to B. & B is an covenant to pay £100 for them however other £75 the condition relates only to the amount to be paid. but no farther. B is to pay something at all events. this contract then is only partially conditional. Perk. sec. 712. 1 Pow. 260.



If A agrees to give B. for his land as much as C judges it to be worth, the obligation to pay is suspended until C determines how much is to be paid. when it is determined the money may be demanded unconditionally. But if C refuses to appraise it, the contract is altogether at an end, for it is entirely, altogether conditional.  
Dyer. 91. 1 Pow. 261.

This subject of conditional contracts, involves of course the subject of unlawful conditions.

The effect of unlawful conditions varies according to the nature of the contract & of the condition itself. on this subject the

First general rule is that if an unlawful condition is annexed to an executory contract, not the consideration only, but the whole contract is void. Thus if one is bound in a penal bond conditioned for the performance of some unlawful act as theft, the whole bond is void, the performance of it can never be enforced because a right of recovery can never be acquired by the commission of a crime. 1 Inst. 206. b. Edw. Dig. 182 175. 185.

The rule is the same when the unlawful condition is for the performance of any unlawful act or omission of any legal duty, or if it militates against the public policy or general welfare, as a condition by the obligor of a bond, not to engage in a particular trade, the whole bond is void, for it cannot be enforced, without compelling the performance of a contract the law will not

allow the obligor to make. 1 P. W. 181. 4 Burr. 2228.

In such cases the law frees the obligor from the penalty, when he is the person to commit the unlawful act, but he should be under temptation to commit it, and deprives the obligor of all benefit he might derive from the obligation, when he is the one to perform for the same purpose. the will of the latter is not aided by committing the act. & the other is freed from the obligation in any event. the object is plainly the same in both cases.

Generally speaking, when an unlawful condition is annexed to an executed contract or conveyance, the condition only is void & the conveyance or principal part of the contract is good. the contract in this case is executed by the parties, and not the aid of the law. whereas in case of an executory contract recourse must be had to the courts of justice.

Thus if one makes a feoff<sup>m</sup> conditioned to be void unless the feoffee does an unlawful act, the condition only is void, the feoffment is good, & the feoffee title precisely as absolute as if there had been no condition annexed. 2 Bl. 157. 1 Inst. 206.6.

In this case the law secures to the feoffee the estate, that he may be under no temptation to commit the offence, whereas if the con. had been vol. this to convey to B. provided B does some illegal act, B receives no benefit from it & whether he performs or not he cannot enforce the contract.

This reason may not be obvious, altho the effect in these



two cases is different. yet the principle, the object & end to be attained is precisely the same in both. The different effect arises out of the different nature of the two contracts.

The law by refusing to interfere in such <sup>est.</sup> contracts. or those which are executed when both parties are in pari delicto. leaves the party who is to commit the act without any temptation to do it and as the law in our case will not enforce the contract, neither will it aid one party in defeating it when it has been executed by the parties. it stands null.

But this latter rule relating to contracts executed, obtains only when both parties are deemed to be in pari delicto. for where the proffer is not perhaps criminal the law will lend its aid as it was made for his protection and make both the conveyance & condition void. As in the case of a mortgage to secure the payment of usury. And it is in consequence of this case for the purpose of giving that protection which the law intends. 4 T.R. 511. 1 Fort. 218. Doug. 451 or 671

Whenever then there is an unlawful condition and both parties are deemed in pari delicto the conveyance & condition both avoid.

Under the first rule as to <sup>est.</sup> contracts I would mention some more examples. If a bond is given in restraint of marriage the bond & condition are both void as opposed to the policy of the law.

So a bond given to a witness or -

ditioned to be void if he appears in court. the obligor is not bound in any court. 1 Burr. 22. 25. 2 Kent. 109. 2 Wils. 311. 4. Esp. 1834.

So a bond given before hand to secure a reward for prostitution, is void in toto. as it is in its essence contrary to immorality. But one given after wards as a reward to the party injured, is good. it being by way of compensation. 3 Burr. 1568. 1 H. Bl. 517 3 Wils. 339. 2 P. W. 432.

And all conditions repugnant to the nature of the contract or conveyance are void. Thus if a proff<sup>r</sup> in fee is made with a condition that the proff<sup>r</sup> shall not alien, the condition is void & the proff<sup>r</sup> absolute. for the condition is technically impossible & opposed to the policy of the law.

So also a con.

veyance in fee conditioned that the grantee shall not take the profits of the estate is good absolutely the condition being void. for it is repugnant to the nature of the estate, so that the conveyance & the condition cannot co-exist. Cro. Jac. 596. 2 Vern 233. 1. Pow. 262.

It is agreed however that a bond or covenant by the proff<sup>r</sup> that he will not alien nor take the profits is good for it is not a condition on which he holds the estate. and there is no total bar to alienation or receiving the profits. As if a father conveys land to his son and the son then covenants by bond to let the father enjoy the profits during his life & that he will not alien the land in the mean time. the son is not prevented from enjoying his rights during



claim or take the profits if he chooses to forfeit his bond.  
 i.e. the damages however <sup>suppose</sup> would be but nominal.

There are several distinctions to be observed with regard to impossible conditions. A condition may be impossible at the time of the contract made or possible at that time and become afterwards impossible and the effect of the impossibility in these two cases is in many instances very different.

As to those conditions which are possible at the time of making the contract or conveyance, become impossible afterwards by the act of God or inevitable accident, the rule is, that if such a condition is annexed to a contract executed, the contract is not avoided by non performance, i.e. the party claiming under the contract a conveyance does not lose his interest by non performance.  
 1 Inst. 206. b. 1 Pow. 264. 444. 446.

Thus suppose a feoffment made by A to B ~~and~~ conditioned that within six months, B goes to L. & transacts certain business for A the feoffor. in the six mo's B dies. Now the estate is <sup>not</sup> ~~is~~ <sup>is</sup> ~~vested~~ in A on B's death, but goes to the heirs of B. and is an estate absolute in them agreeable to the maxim. "actus dei nemini facit injuriam".  
 10 Mod. 268. 1 Co. 98. Voy. 35.

The rule is the same when the condition is rendered impossible by the act of the party granting the interest or entering into the contract. as if a conveyance is made to B ~~and~~ conditioned that he appear at a certain time & place to do cer-

tain acts, now according to the terms of the contract if he does not appear at the time & place for the purpose specified he takes nothing by the conveyance. But if in the mean time it kidnaps & imprisons him so that he cannot perform the condition, the condition is void. The reason is the same as when the impossibility is created by inevitable accident.

The principle of the rule is that the estate being vested, cannot be divested except by the default of the proffer, and he is not in fault, when the non performance is occasioned by the act of God or of the other party or by the force of law of which I am to speak directly.

But it is otherwise when the condition becomes impossible by the act of the party himself, as of the proffer in the example above if he had committed suicide or become *felo de re* for the law will not suffer him to avail himself of a supervenient cause occasioned by himself & in that case his heirs could not hold the land. 1 Inst. 210. b. 1 Pow. 420.

I have given examples of conditions which were impossible at the time of making the contract or conveyance but which became afterwards impossible by the act of God or of the other party. We are now to consider those which are made impossible by law.

Suppose a man makes a grant to B conditioned that he perform a voyage from N. to Eng. within such a time, and directly after an act is passed prohibiting all intercourse between the



two counting which continues during the whole time fixed in the condition, the grantee is allowed to treat the thing stipulated in the condition as an impossibility, for what the law prohibits it treats as impossible, so that the thing granted vests absolutely in the grantee. 2 P. W. 218. Salk 198. 3 Bro. Par. Ca. 389. 5 ib. 269.

And finally to give an example when the condition is afterwards rendered impossible by the act of the party making the grant, A makes a proff<sup>r</sup> to B conditioned that B marries C within such a time, & in the mean time A marries her himself. Now non performance by the proff<sup>r</sup> will not defeat his estate. ib. anc.

But when a condition which is possible at the time of making the contract or conveyance, but afterwards becomes impossible by the act of God or by positive law, is annexed to an executory contract, the whole obligation is discharged, then the penal part does not stand alone but the obligor is discharged. Salk 170. 1 Fent. 209. 1 Ter. Rep. 538. 7 ib. 384. 2 N. Pl. 126. 128.

Suppose a bond given by A to B. with condition to be void on A's appearing in a Ct. on such a day. A dies before the day, the whole obligation is discharged, it does not stand a single bill, as it would in an executed contract. Suppose the condition had been to perform a voyage which a new stat made illegal or impossible the effect would be the same.

The rule here again is the same when the condition becomes impossible by the act of the obligor or covenantor, the party in whom favour the obligation is made. Thus A gives a bond to B conditioned to be void if A marries C within such a time. & within that time B marries her himself, the obligation is destroyed.

It would be otherwise if the performance were rendered impossible by the act of the obligor. The moment he renders it impossible to perform his own contract he is liable, that is immediately, altho the time of performance has not arrived, for he shall not avail himself of himself of his own wrong. 5 Co. 21. 1 Esp. Ca. 430. 2 ib. 522. 6 Johns. 110.

Thus suppose A gives a bond to B, conditioned to carry his horse to him on such a day, & before the day arrives, A wantonly burns the horse. He is liable immediately.

The effect of such a condition in an executed contract is different from that of a similar one in an executory contract, but the principle is precisely the same.

When the contract is executed, the estate is vested and the law will not suffer it to be divested unless the grantor has been in fault, but when it is executory, recourse must be had to the court, who will never compel performance of the condition unless the covenantor has been faulty.

Suppose a bond given conditioned that the Def<sup>t</sup> & J. S. appear in court at the return of the writ, and J. S. dies, the bond is discharged, the contract being up & the obligor not in fault.



So if it was conditioned to export a certain quantity of cotton & a statute should intervene (at sea) the bond would be entirely discharged. Or the condition be that obligor or any obligor in ten days, and so on any another before the time has expired the bond is discharged. 7 Tulk. 198. 2 St. Rep. 240. 8 Co. 92. Cro. Eliz. 374 1 Inst. 206.

I would here recur to a rule before laid down viz. that if one expressly & unconditionally covenants to do an act which at the time is possible but afterwards becomes impossible by the act of God or inevitable accident, the covenantor is bound notwithstanding as in the case before mentioned, of a ship master to sail to Winyan. This might appear contradictory to rule that I have just spoken of in relation to the conditions of an ex<sup>g</sup>. contract, which if made impossible in that manner discharge the whole obligation. In the case of the ship master the construction was plainly such as the intention of the parties warranted, he being virtually an insurer. But in the case of the bail bond, the act to be done is merely to avoid a penalty.

The difference then in the two cases is founded in a difference of construction & that founded in a plain difference of intention.

If a contract contain a clause making the party bound a judge whether the consideration is performed or not is void & a jury may determine the fact notwithstanding, as if the contract were to build a house in a particular manner, and the

party is to determine whether the work is well done, such a clause is an inducement to defraud & is opposed to the first principles of contracts. 2 Ct. Rep. 408.

If a bond is given conditioned for the performance of one of two things in the alternative & one of them becomes impossible by law or the act of God, the obligor is still bound to perform the other. [unless indeed the obligor him self occasioned the impossibility in which case the obligation would be at an end.]

This rule was formerly otherwise, because as <sup>Mr</sup> Coke says the obligor loses his election which by the covenant he was to have. But the reasoning is much more satisfactory in saying that as he was to perform one he is bound to perform one, he must do the other. Thus suppose the covenant be to convey house or land & the house is burnt down by lightning. 1 Bos & Pul. 242. 5 Co. 22. 10 Mod. 26. Salk 170. 1 Pow. 398.

If a condition becomes practically impossible by the act of God or by the law, the obligor is still bound to perform as much as remains possible, provided the obligor requires it. Thus suppose the condition be to convey land & house & the house is burnt by lightning.

So if the entire act is made impossible by law, the obligor may be required to do as much as is consistent with the law. Thus an ecclesiastical body covenanted to have for 60 y<sup>rs</sup> before performance a statute prohibited such bodies making leases for a longer time than 40 y<sup>rs</sup> the obligor was enabled to do -



mand a lease of 40<sup>yrs</sup> Plow. 284. 1 Inst. 352. 2 T. Rep.  
254. 1 Pow. 448. 451. 2 ib. 31. 1 Fent. 209. 211. 2 Bl.  
Rep. 731. 2 Ann. Bl. 163. 581. — § 2 et seq. 468.

We have considered those conditions which were possible  
at the time of making the contract & afterwards be-  
came impossible by act of God &c. I found that in  
such a case the whole obligation was dis-  
charged by the supervenient impossibility. When to void  
contracts, the condition only was void & the convey-  
ance absolute.

With respect to the other class of con-  
ditions viz. those which are impossible at the time of  
making the contract to which they are annexed  
I have to observe that their operation depends  
upon the question whether the condition be subsequent  
or precedent.

A precedent condition is one that  
must be performed before the right or estate depen-  
dent upon it can vest or accrue. A subsequent  
condition is one by which a right or estate already  
vested is to be defeated and for this reason it is  
usually termed in law a defeasance. For its ef-  
fect is to defeat. 1 Inst. 206. 2 Bl. 156. 7. Hume. 661.

As to the  
effect of a precedent condition if it is impossible  
at the time of making the contract, the right  
or estate which is the subject of the conveyance  
can never vest. the contract is void at initiation.  
For by the terms of the conveyance the estate can never

not unless the condition be performed. If the condition is by the supposition impossible. Thus a covenant to leave to B if B goes to Rome in one day.

But if the impossible condition is subsequent, the condition only is void & the estate is vested and the non performance is not the fault of the grantor. Thus the condition of a penal bond is, that the obligor goes to China in 24 hours the bond is single the condition void. 1 Inst. 205. 1 Pow. 266.

I find words in the books relating to a condition precedent which is possible at the time of making the contract of conveyance but which becomes impossible afterwards without the fault of the obligor or grantor. It states it without doubt, that the rule would be the same as when the condition was impossible at the time of making the contract.

Thus A leases to B. to take effect first in fee simple when B returns from India. B dies or never returns. it is clear from the terms of the contract & the supervenient impossibility that the estate can never vest.

The rule is the same if the precedent condition is unlawful. you will remember that if an illegal condition is annexed to an est. contract the whole is void. if to an executory contract the condition is void.

But when an unlawful condition is precedent no right can ever vest. Thus A makes a conveyance to B to take effect when B steals. now it is plain that



no right can vest until performance. & if B steals it cannot vest. for no right can be acquired by an unlawful act. 2 Bl. 157

If a subsequent condition is impossible at the time of making the contract or conveyance, it has no effect whatever the contract is in law unconditional. as a prom<sup>se</sup> to A. to be void if proffer goes to Rome in 24 hours.

And the rule is the same in relation to conditions subsequent which are impossible at the time of making the contract & those which become so afterwards, unless the impossibility is occasioned by him in whose favour the contract is made. If an E's contract is accompanied with a condition which at the time of making is impossible, the contract only is void. As a bond to B conditioned to be void on B's failing to go to Rome in an hour. this is in legal construction a single bill. 1 Inst. 206. 2 Bl. 157. 1 Pow. 266.

The distinction under this rule is so narrow, that it is very important to understand the reason of the rule. Now if it be asked, why a subsequent impossible condition annexed to a contract should have no effect, either if antecedent impossible condition be annexed it dissolves the whole contract? I answer, that when a penal bond is given the penal part creates a debtum in presenti. So in a promissum the estate vests in presenti. and a subsequent imposs. condition, which is impossible at the time annexed by way of defeasance is void.

The bond in one case is in effect a single bill, and the state in the other vests absolutely. 2 Bl. 157.

This rule is founded in the maxim that the law never compels a man to do an impossibility. & the condition is void by matter of mere construction.

In the case of real contracts if the impossible condition is incorporated in the body of an instrument, instead of being annexed by way of defeasance, the whole instrument is void, for the condition is in the nature of a precedent condition. & there is no debt in present.

To explain myself. A penal bond running thus. Know all men by these presents that I A B &c. am firmly bound & obligated to C D in &c. sum of £1000 to the paym<sup>t</sup> of. in witness whereof he sealed. Now this creates a debt in present it is thus far an absolute unconditional debt. Then follows the condition. the "condition of the above obligation is such" he unless the B C D goes to Canton in 24 hours it is to be void. This condition the law makes void & the debt then remains a present debt it being a distinct thing which the condition is intended to defeat.

But if instead of such a bond the contract had been thus. This indenture made &c. between A B & C D &c. that A B in consideration of C D's undertaking to sail to Canton in 24 hours, covenant to pay him £1000. &c. the contract is void in toto by the terms of the con-



tract there is no arbitrium in present. A. B. agrees to pay if C. D. will perform an impossibility & C. D. has no claim without performance. This you will observe constitutes the difference. 1 Palk. 172. 1 Pow. Com. 267 1 Comm. 66 n. 1

Contracts & agreements required by Stat. law to be written.

I am not now to notice the distinction between specific & simple contracts. That will be considered under the head of consideration.

The rules relating to the subject now in hand were introduced by the stat. of frauds & perjury as it is called. reg. ch. 2. for which see 1 Bac. 42 2. Bl. 157. 1 Pow. 267.

This stat. is a very similar one is probably in force in every state in the union. Our Com. st. as far as it extends is a transcript of the Eng. stat.

The Eng. stat. having been long in force & received many constructions as applied to different cases long before our statute was made, so that having adopted the Eng. statute the propriety may be said to have adopted the construction of the Eng. courts.

The statute provides that certain classes of agreements will not support a bill or not be made the foundations of any action or suit in law or equity.

unless the agreement or some memorandum of it be in writing signed by the party or his authorized agent. ibam. Stat. Can. 354.

The precise effect I indeed the only one, is to make a new requisite, i.e. that there be some writing in form of a memorandum, duly signed, to give certain contracts or promises legal effect, which by C.L. would have been good by parole merely.

For the statute does not provide that the contract shall be void if unwritten, but that no action shall be maintained on it. And this remark will be found very material, for it is observable from the phrasing of the stat. that its effect is to prescribe a new rule of evidence requiring written in some cases when at C.L. parole evidence would have been sufficient, and it is apparent from the same source that it was not the intention of the legislature to affect the inherent force of the parole contract, that has precisely as much inherent validity as it had at C.L.

The classes of cases contemplated by the Eng. st. are six and includes the first five. In the first place it is provided that no action shall be maintained at Law or Eq. on any of those species of contracts or promises unless the promise be reduced to writing &c.

1<sup>st</sup> Promises made by Executor or Administrator to answer out of their own estates any debt or duty of testator or intestate.

2<sup>d</sup> A promise by one person



to answer for the debt of another or mis carrying of another.

3<sup>d</sup> Promises upon consideration of marriage

4<sup>th</sup> Contracts or sales of land, tenements or hereditaments, or of any interest in<sup>or</sup> concerning them contracts of land<sup>s</sup> is an exception in<sup>or</sup> relation, the meaning of the sentence is doubtless sales or contracts for the sale of land

Now I would observe that by the Eng statute it is provided that all parcel sales or leases of land or of interest in them shall operate as leases at will if they are for a term not exceeding three years and reserving a rent equal at least to two thirds of the improved value: such leases then may be good tho by parcel. And now in Eng leases at will are by continued decisions considered the same as leases for years from year to year.

In our case it is stated that there is no such exception so that all leases are here treated alike.

5 Contracts not to be performed within an year from the time of making them

6 Lastly there is a clause in the Eng stat. making a similar provision respecting the sale of goods of the value of £10 or upwards, which is omitted in ours, and I will now observe as I shall not treat of this kind of contracts, that this provision extends as well to executory contracts as to those which are executed at the time. *14. 2d. 31. 63. Stat. St. of Eng. 111.*

Now I would observe that the amount of the statute is that none of these classes of contracts will support an action at Law or Eq. unless they are in writing or some note or memorandum of them is reduced to writing: signed by the party or his authorized agent, with the exception in the 2<sup>d</sup> class of leases of a term of them, <sup>years</sup> reserving the specified rent, and another in the 5<sup>th</sup> or last, relating to the sale of goods which may be binding in law if the buyer accept part of the goods so sold & actually receive the same, or give something in earnest. 1 Bac. 73. & T.R. 3

The object of public policy, proposed was to prevent frauds & perjuries, or rather frauds through the medium of perjuries. Hence the statute is denominated the act of frauds & perjuries; & this object was to be affected by preventing the proof of such contracts, as are embraced in the stat. by parol evidence. It being supposed that there was great danger of perjury in proving them without the solemnity of written testimony.

Contracts of the first kind, are promises by Ex<sup>r</sup> or a Cur<sup>r</sup> to answer out of their own estate any debt or duty of the testator or intestate.

It has been said under this clause that if he has assets in his hands to answer the promise it shall bind him personally even tho it be by parol. because it is said that the assets being advantageous to him; transfer the debt or duty to him personally. 1 Wyl. 125 b. 5 T.R. 8.



This however is a mere dictum, & there is no judicial decision to support it: indeed it has been overruled by writ of error being expressly against the point of the stat.

The reason assigned is not true & if there would not support the proposition. The prop<sup>n</sup> is an Ex<sup>or</sup> & of course cannot transfer the duty to him personally. the judge, de bonis testatoris. & not de bonis propriis.

Again the stat does not depend upon the ground of distinction in contract as to consideration. If the agreement was without consideration it would not have been good before the stat. and if any bare promise is good which is made on good consideration the statute is completely done away. A man further his written promise will not bind him without consideration this however is to be a question in an action on a written promise but if the promise is not written there can be no question as to the consideration since the stat 29 Ch<sup>2</sup> 2. 878. 7 T. Rep. 358. 1 Robt 206. 5 C. Rep. 600.

Indeed early in the last century it was determined by L<sup>d</sup> King that proof of assent in the hands of Ex<sup>or</sup> would raise an implied promise by Ex<sup>or</sup> to pay the debt out of his own estate. But this was clearly against C. L. as well as the stat. cancelled Comp. 288. not law. 5 T. Rep. 690. 350.

It was not long since determined that if an ad<sup>or</sup> submitted a claim made upon him as Ad<sup>or</sup> to an arbitrator it was an assumption of assent. This however has

been overruled & seems strange how such a decision should  
 ever have been made. such a subscription may be very  
 desirable. to ascertain the existence of the debt & also  
 to know whether he has assets or not. 1 T. Rep. 691. 2  
 5 Ch. 6. 7 7 Ch. 453.

But if in subscription to arbitrators it is  
 awarded that he shall pay a certain sum. It is proof  
 of assets to that amount. & he cannot afterwards deny the  
 fact by avowing that he has no assets. for such an a-  
 ward is equivalent to indeed includes a finding of as-  
 sets to that amount. and an award is generally as sacred  
 & as binding as a judg<sup>t</sup> of a court of law. 7 T. Rep. 453.

It was once held that the pay<sup>t</sup> of Interest by Ex<sup>t</sup> was  
 an admission of assets to the amount of the principal  
 or rather with this qualification that it the award pro-  
 vided on the Ex<sup>t</sup>. This too has been overruled & replaced  
 for it might be that Ex<sup>t</sup> had assets precisely to pay  
 the interest & no more. and it was his duty to pay  
 that. 5 T. Rep. 8.

But an acceptance of a bill of ex-  
 change by the drawer Ex<sup>t</sup> is an admission of assets  
 to that amount. i. e. an unqualified acceptance by  
 the Ex<sup>t</sup> as such. Besides to permit him to deny having  
 assets would be ag<sup>t</sup> one of the cardinal principles of  
 mercantile law. by infringing the rights of third per-  
 sons. 2 H. 1460. 3 Wils. 1. 1 Ch. 36. 622. 2 B. & 1225  
 1 T. Rep. 487 Chit. Biss 2 & 3. 112. 82.

And a transfer by  
 the Ex<sup>t</sup> of a holder of a bill of exchange amounts to



a similar admission on his part. for endorsing over a bill amounts to drawing a new one. By drawing a bill the drawer covenants that if the drawer does not pay the bill he will. 2 Stra. 1260 3 Wils. 1. Chitt. Bils. 111 112.

Altho it is necessary that the Ex<sup>r</sup> promise should be in writing to bind him to answer out of his own estate the debt or duty of his testator, yet he is not bound if the promise is written unless some sufficient consideration is shown. The stat was not meant to subject him by every writing but to prevent his being subjected except by a written agreement. Forbearance of a suit is sufficient consid<sup>n</sup>. Indeed the rules relating to this subject are precisely like those which govern oral promises before the statute. The mere fact that the testator was indebted is not enough. 7 T. Rep. 350. note.

I observed that he is not liable on every written promise but an Ex<sup>r</sup> is liable on written promises in those cases and those only in which he would have been liable on oral promises at C. L. and this I take to be a complete criterion by which to determine the extent of an Ex<sup>r</sup>'s liability. Robt. 202. 1 Vry. 126. 7 T. Rep. 350. note.

And to make the Ex<sup>r</sup> personally liable on his promise the written, there must have been a prior existing claim debt or duty, formerly resting on the testator, which bound him as Ex<sup>r</sup> and without that there can be no consideration. For the statute relates to such promises as were made to pay some debt or duty

of his testator. 2 Saund. 136. Cro. J. 247. Robt. 206.

The consideration necessary to support the promise must also appear in the writing. This rule is established under the construction of the word "agreement" used in the statute. It does not direct that the promise be in writing, but the agreement is the contract of both parties, so that what ever relates to the transaction on either side, which of course includes the consideration, must appear in writing. 5 East. 106 ib. 307. Robt. 116. 207. 67.

But an Ex<sup>r</sup> to take advantage of this clause must have been an Ex<sup>r</sup> when he made the promise, otherwise the promise is not within this clause of the statute. As a promise made by one in consideration of being afterwards appointed Ex<sup>r</sup>. Or. sup<sup>r</sup>ior in after the death of the original debtor promises to pay a certain debt of intestate, provided he is appointed adm<sup>r</sup>; the promise is not within this clause. Whether it would be within the statute at all must depend upon the nature & terms of the contract. Amb. 330. Robt. 201.

In declining against an Ex<sup>r</sup> on the promise to pay the debt of testator it is not necessary to aver assets, for he is subject if at all de bonis propriis, & it is no defence that he has no assets, the action is not to recover against him individually. Whereas if he were sued in his original character of Ex<sup>r</sup> or such, he is not to be subjected without assets. Robt. 205.



## II. Promises by one person to answer the debt default or miscarriage of another.

Under this claim there is established by construction the general distinction. If the promise is made by one for the benefit of another is original it is binding & not within the statute by parol. But if collateral, it is not binding unless it be in writing being within the state 2 Kay 1087, Couph. 227. 1 Wils. 306. 3 Burr. 1888. [Exp. 101. 2.]

It is to be observed that the words original & collateral are not used in the statute at all, the distinction between them arises out of the construction of the statute. By a collateral promise is meant in effect a promise to answer for the debt default &c of another. But an original promise is not in effect to answer for the debt &c of another.

A promise is said to be original when it comes under one of the three following classes.

1<sup>st</sup> When the third person for whose benefit it was made is not liable at all to the promisee. It can with no propriety be said to be a promise to answer for the debt &c of another, when the party promising is the original debtor. As if A makes a promise for B in a case in which B is not nor was ever liable at all. Bull. et. P. 281. 3 Burr. 1921. Thacker. 212. Park. 209 216.

2<sup>d</sup> A promise is said to be original & not within the statute when the third person, liability for whose benefit the promise was made, is extinguished on the promise.

being made. This we sometimes question. E.g. & I say to  
 B. here the bond you have got. I'll & I will pay you  
 for it. This is a promise to pay the amount of A's  
 debt; but it does not take effect till his debt ceases.  
 it is said, therefore to be an orig<sup>l</sup> promise & I think  
 correctly. (of this more hereafter) Robt. 22. 4.

3. A prom-  
 ise is also said to be original & not within the stat.  
 when there is a new consideration, arising out of a  
 new & distinct transaction or res gesta. and moving  
 to the promisor. i.e. made for his benefit. For in this  
 case the original debt is only a measure of what is  
 to be paid for another object, there is a new considera-  
 tion. 3 Burr. 1886. 3 Esp. 86. 2 East 325. Robt. 232.

Now to sum up the reason of this whole distinction. If it  
 be asked why is this promise called original. I answer  
 that it is because in construction of law it is not a prom-  
 ise to answer for the debt of another, altho the lan-  
 guage would import it to be so.

But on the other hand  
 when a promise made by one is merely in aid of a subsis-  
 ting & continuing liability on the part of the third  
 person for whom benefit the promise is made, or to  
 procure credit for such third person the promise is  
 collateral & so within the statute.

So when the promise  
 is made by one in behalf of another to furnish a remedy  
 to the promisee a new remedy ag<sup>t</sup> himself in addition  
 to the subsisting remedy against the original



promisor or debtor. 5 Clend. 205. 2 Will. 94. 1 id. 306. 2d  
 Ray. 1085. 6. Salk 27. Comp 461. 1 Hen. Bl. 120. 1 B & P. 128.  
 3 B & P. 205. Esp. 106. 2. Peake's Co. 212.

If it is asked why then  
 in collateral promises, I answer by applying the converse of  
 the former reason to single promises that such promises  
 as these will always be found on investigation, to be both  
 in legal effect & construction as well as in form, promises &  
 answer for the debt &c of another.

For example thus and  
 the first rule it says I deliver goods to A. for his use  
 & charge then to me and I will pay you, the benefit is for A.  
 but the debt is not his, it is arising to debt of A. which by  
 the terms he alone engaged to pay.

Or thus deliver goods to A. for  
 on my account, or deliver goods to A. & I will pay you, the  
 understanding is, the <sup>same</sup> A. alone answerable, it is my  
 debt but within the statute. 2 T. Rep. 81. 2 Ray. 1086  
 1 Hen. Bl. 120. Robt. 217. 216.

But on the other hand if it contracts  
 with a third in this form, deliver goods to A. for  
 his use & if he does not pay you I will the person  
 in is collateral, it is but merely a security. It is a  
 promise to pay the debt of another, in aid of A. liability  
 gives him credit. & promises the creditor with an ad-  
 ditional remedy to recover the debt & therefore collat-  
 eral. A. being the debtor. 2 Ray. 1086. Salk 28. Esp  
 Dig 102. 1 Hen. Bl. 121. Comp 227.

When the agreement  
 is in this form "Supply A. with bread & I will see you"

according to the later opinion it is collateral, at least it is collateral *prima facie*.

You observe that if the words are deliver goods & I will pay you' a charge to me is on my acc<sup>t</sup>. the promise is orig<sup>l</sup>. But in that case the promise is but a guarantee of the debt, it being absolutely the intention that A. S. was to stand as debtor. The opinions are not uniform but the point is subtle, the only question is whether A. S. is to make a debtor, it depends some what the common acceptance of such promise among trading men. if the promise was first to be charged, the promise is orig<sup>l</sup>. 2 C. P. Rep. 80. 81. 2 Bay. 221. 1 B. & P. 158. Robt. 223. contra Sal. 58.

L'Amosfield was held that such a promise made before the goods were delivered was orig<sup>l</sup> but the rule as now made after was collateral. & I doubt much whether the distinction were not a correct one. It was however overruled. Buller observed that that distinction has much force. L'Amosfield considered that a promise before delivery made the promisor the orig<sup>l</sup> debtor. But by the later cases it seems that when the promise is in this form the court is at liberty in collecting the intention of the parties to consider all the circumstances of the case and it may be that when the promise is in this form, and *prima facie* collateral, yet the court will consider it as original. 2 C. P. Rep. 81. Robt. 223. 12. - 1 B. & P. 158. Robt. 223. 223.

I can easily suppose a case of this kind. A third person as a guardian of my property, is about to go to Canton



and I see to a trade trust him & I will see you paid within three months. the promise here is clearly original. The amount of the determination then is that a promise in this form for the benefit of a third person is *parum facit collaterum*. but it may be shown to be orig<sup>n</sup> from all the circumstances which together give us the intention of the parties.

Again a promise in this form "if you do not know whom you know" "me & I will see you paid" was held not to be collateral. The promise is merely a guaranty of the debt & clearly within the stat. 2 P. Rep. 80. Esp. Dig. 101.2 Rob. 210.11

So a promise by me that in consideration of your letting a horse to A. B. he shall redeliver him is collateral. this an undertaking to answer for the default of another. to procure him credit. my promise does not discharge him from his liability on the bailment it only furnishes the hirer with an additional remedy.

And indeed it is a gen<sup>l</sup> rule that a promise by me that another shall pay money or do an act for the not doing of which the third person <sup>himself</sup> would be liable is collateral & within the statute. for it is plainly an ag<sup>t</sup> to answer for the debt &c of another. Rob. 232. 219. 2 P. Rep. 1085. 1 Bac 75. b. 3. Falk. 15. Falk. 27. Hott. 606.

But if one stipulates for an act to be done or a promise to be made by a third person, who would not be liable for not doing it, the contract is original and not

promiser would be liable. E.g. A promises B. on sup<sup>t</sup> consideration that C shall pay a sum of money & that if he does not, he <sup>ed</sup> will. C not being already indebted nor privy to the promise, it is orig<sup>l</sup> the in form it is collateral. C is not indebted, nor under any obligation, so that he can make no default or be guilty of any misfeasance for he has not undertaken to do any thing.

The case is similar to this. I apply to J.D. to let me have a horse for a sum certain which I engage A.B. shall pay & if he does not I will. A.B. not being privy has no concern with the promise. I am the debtor. Robt. 222.3. Gibb 307.

If an agent buys goods at an auction without discovering the names of his principals, his promise included in the bidding is binding on himself, it is orig<sup>l</sup> the he acts for another. He buys for another or obtains the goods & the principal yet the auctioneer knows nothing of the relation. 3 Burr. 1921. Peckham Ex. 213

And it seems that to make promise collateral, it is not necessary that the third party should not only be liable, but should be liable, or become so at the time the promise is made. La Ray. 1085. Robt. 219. 222. 232.

This is illustrated by the last example, where I promise that A.B. shall pay & if he does not, that I will. If A.B. afterwards undertakes to pay it does not discharge my promise, and altho his name be in writing still mine remains, for it is the orig<sup>l</sup> promise, and if his were not in writing it would not



be binding being collateral & within the statute. My promise was original at the time it was made and cannot be made collateral by matter of post facto.

If a promise be made by one of several persons already liable, it is not within the statute, it is orig<sup>l</sup> and not a promise to answer the debt of another. Thus a judgment against two debt<sup>r</sup>s one promises to pay the whole, for it is only a promise to pay his own debt. per Diffeney collect the whole of one 5 Mod. 205. 213. Comb. 362. 2 East 335. 2 Esp. Rep. 484.

When according to the distinctions here taken, the promise is original, the common action of indebt<sup>d</sup> ap<sup>t</sup> is the proper form, as when I or du goods delivered on my account, that I will pay for, the action is the same as if I took the goods myself being the only debtor.

But if the promise is collateral and a writing is given to take the promise out of the statute. Indebt<sup>d</sup> ap<sup>t</sup> will not lie. it must be a special action in the case, it cannot be said that I am the debtor I only guarantee to pay<sup>r</sup> and all the particular facts must be stated 1 Burr. 372. 3 W. 363. 2 Ray. 1085. Rep. 20.

2<sup>d</sup> It is laid down in the books that a promise to pay a debt due from a third person, in consideration that the promisee will extinguish the debt against the third person, is original and therefore not within the statute. For it is not in aid of a subsisting debt of a third person or his continuing liability or to obtain

credit for him. E.g. "Bare the bond you hold against J.S. & I will pay you or see you paid" 3 Burr. 1888. 1st Rep. 130. — This however has been doubted. Robt. 222. questions on our side 1st Rep. 130.

The rule notwithstanding appears to me correct on principle and according with the true construction of the statute. tho I know of no judicial determination to support it. The promise in the case supposed is to pay the amount of J.S.'s debt. but the moment it takes effect J.S.'s debt is extinguished inasmuch the promise cannot <sup>take</sup> effect until that event takes place. it is a precedent condition to the promise, and when the promisor pays he does not pay the debt of J.S., or that is no longer in existence. it only furnishes a means of clearing up. the consideration is clearly sufficient — being disadvantageous to the promisor.

Again when the promisor becomes the purchaser of a debt due from another and engages to pay it to the party transferring it, the promise is clearly not within the statute. Thus "if you will transfer the bond you hold against J.S. to me I will pay it or at a discount." It is merely a purchase of the property by the promisor from the promiser, and is not substantially altho it is in form a promise to answer the debt of another. 1st New. Rep. 130. 2 East. 325. 11064. 22d.

3<sup>d</sup> I would further observe that when there is a new consideration arising out of the original or new transaction & moving to the promisor, the promise is original. altho it be in the terms of a collateral promise as to pay the debt of another, for



the original debt is only the measure of damages. This was the principle on which the case of Williams and Luper was decided. Then a landlord came to destruction for rent arrears, the Def<sup>t</sup> promised to pay the rent arrears if the landlord would abandon his lien upon the goods, and the promise was held to be original & not within the statute. 3 Burr. 1886. Peat v. Est. 213 2 East. 325

That case

was regarded with some jealousy, but it was clearly correct on principle & has been lately recognized by Lord Eldon, enough in its fullest extent. The consideration in that case arose out of a new transaction, by which a parcel was disincumbered of a lien. The promise was made for resigning or abandoning or resigning one interest in favour of the promisor, which was in the power of the promisee, for the purpose of securing the rent. As if I should say I will pay I's bond if you will deliver to me certain goods, the resignation by D<sup>f</sup> gave D<sup>f</sup> his right. Lord Mansfield said that case had nothing to do with the statute, meaning probably that the promise was not to pay the debt of another in the contemplation of the stat. the debt of the third being merely a measure of damages. 3 Esp. 86. 3 East. 325. Salk 25. Robt. 232. L<sup>d</sup> Ray 400.

When one is under a moral obligation to pay, for a benefit received by another a bare promise will bind him. As when an apothecary in an emergency furnished a pauper with the medicine & the overseer of the poor promised to pay for it this promise was binding tho by law, for it was the duty of the promisor.

use to pay the debt. Rule N. P. 281. Peake's Ev. 213.

### Miscellaneous Rules.

A promise to pay a certain sum in consid<sup>n</sup> of promisee withdrawing a certain sum ag<sup>t</sup> J. D. for an assault and battery, has been held an oblig<sup>n</sup> & binding the by hand, for there was no debt due from J. D. it did not appear that there was any default in him. The promise was not for the performance of the same duty. J. D. was never liable to pay the particular sum promised or bound to perform the particular duty which the promise imported to create. 1 Will. 305. 7 T. Rep. 204. 3 Day. 457. Peake's Ev. 214. Robt. 208. 233.4.

And to bring a parcel promise within this clause of the stat, there must have been, at the time of the promise made, some debt or duty <sup>in</sup> ag<sup>t</sup> the party in whose favour the promise was made, which was ascertained or capable of being ascertained by reference to some common standard or market price, (for, since the time collateral is relative)

But a promise to pay the debt in consideration of promisee staying a suit br<sup>d</sup> ag<sup>t</sup> J. D. <sup>as within the stat.</sup> for it is collateral, the debt subsists ag<sup>t</sup> J. D. & no lien or interest is assigned or abandoned by promisee & no new consideration arising to the promisor. 3 Burr. 1887. 7 T. Rep. 201. 2 Will. 94. Robt. 208. 33.4. 2 St. Bl. 212. Stra. 873.

And a promise in consid<sup>n</sup> of the promisee forbearing an action of trover ag<sup>t</sup> J. D. with an engagement that promisor shall pay the damages is collateral; for in



tion the value of the property is the rule of damages and in this action the law admits no right to recover vindictive or presumptive damages as in case of trespass or battery where there is violence. Such an engagement must then be merely to discharge the duty of another. 2 Day 455

as promise to pay A's debt if B. would release A. taken on mere words, is not collateral, the stip of no such case. For the debt still continuing that is not extinguished at the time of promise made nor is any kind abandoned. I may be asked again

If however the debtor had been taken on final process a promise of this kind would have been good for him the debt would be extinguished before the promise could be effectual, for the discharge of a debtor's body taken on ex by the cred is ipso facto an extinguishment of the debt proven. This comes within the second class of orig<sup>d</sup> promises. 4 Burr. 2482. 1 T. Rep. 557. 6 id. 525. 7 id. 421.

It has been said that when there arises a new consideration, a parole promise to answer for the debt of another is good. Whether the <sup>consideration</sup> arises out of a distinct transaction, or not, moves to promisor or not and whether the debt is discharged or not. But the statute would be perfectly negatory if this were the case, for a promise by C. to pay B. if B. would release his debt against A. would not be good without some consideration. since if every parole promise in good consideration is good the stat is infected. If promised to pay B. if B. would delay his suit against C. then the consideration is a consideration yet the promise is collat.

real sub 330. 3 Dec 1887. support such promise. but  
 contra. 2 Wils 94. Sta. 873. Bull & P 281. 2. 2 Day 457.  
 7 T. Rep. 231. Robt. 232. 239.

It has been determined:

on & I think correctly that if a written promise is given to pay  
 the debt of another provided the debt does exist, is discharged  
 by granting forbearance to the debtor. Thus if A holds a  
 note against B. & B guarantees the debt. & A lets it  
 run by and delays making his claim, he loses all  
 advantage of the promise, for that was only guaran-  
 tee of B's <sup>origi</sup> ability, honesty. Wils. 397

Admitted before  
 that according to the phraseology of the state of Florida  
 & Virginia the object of the Legislature did not appear  
 to be to make those parol promises void, but merely  
 to require a new rule of evidence. Hence a judicial  
 confession by Def<sup>t</sup> of a parol promise to pay the debt of  
 another including the necessity of proof will take the  
 case out of the state. As if to an act on such prom-  
 ise Def<sup>t</sup> should plead tender, if he supports the plea  
 Plff takes the money on payment of costs.

This & a number of cases  
 stated and decided of the fact mentioned the other day  
 that the state does not affect the inherent validity  
 of a contract - it only introduces a new rule of ev-  
 idence for if the contract were void no recovery could  
 be had. Peake Rep. 15. Peake Ex. 204. Robt 238.

When  
 according to the rules above laid down a promise  
 to be binding must be written. it is still not necessary



for the promise to have it to be in writing, it is sufficient that it appears in evidence for the statute does not affect the Ch. rules of pleading, altho. it introduces a new rule of evidence. Ray. 450. Bull. at P. 277. 1 Bac. 75. 3 Burr. 1190

Bull. 157. 2022

In the 1st volume it once for all the distinction is applied to all the different classes of contracts within the Stat. they are not to be decided upon as written, it is sufficient they appear in evidence. Comp. 289. 12 Mod. 540 2 Bac. 655. 2 Bull. 146.

Hence if an action is brought on any of these contracts or promises under the statute & there is no account of a writing in the Deft's 1st defence on this ground, Plff will have judgment for damages except the promise be excluded the necessity of proof. And the courts say that they have a right to presume on Deft's that there is a promise in writing for Plff has a right to introduce such evidence. & were it not so Deft's would have it in his power to exclude Plff from his legal evidence. 7 T. Rep. 353. note. 1 Bull. 77. 8.

But when a collateral promise is pleaded in bar of another action. It is necessary for Deft to aver it to be in writing, the reason is that more strictness is required in special pleas than in Deft's. A special plea admits that there was once a cause of act. & Deft's must show another to rebut it. Bull. at P. 277. Ray. 450. 2 Mod. 49.

But both in pleading or proving such promise in any manner it is necessary to aver a sufficient con-

siduation for or the the statute will not admit a recovery on this promise unless written, yet it does not follow that a recovery is of course to be had if the promise is written, the C.S. requisite of cons. &c. still remains, 7 T. Rep. 550. Robt. 202.

And a collateral promise to pay the debt of another & also to do some other act, is within the stat. in toto. not only as to that part which stipulates for the pay<sup>t</sup> of the debt but the whole promise, entirely. — for one part of an entire contract cannot be severed from another. if one part is void the whole is so. As a promise to pay the debt of another & to deliver a bush of wheat. the promise being entire, made one and consid<sup>d</sup>. & at the same time. 2 Vent 223. 7 T. Rep. 201. to 204. 1 Cr Rep. 130. Robt. 212. 231 173

Now to determine when an undertaking is entire within this rule, altho to perform diff<sup>t</sup> things the rule is not in the promise & structure of the undertaking requires that you declare upon or plead in any form the whole contract, so that pleading a part would make a variance; the undertaking is entire & is divided to consider this rule. The necessary connexion or want of it will enable you to determine this point.

**III.** Agreements of the third class are those made in consideration of marriage.

This clause you will observe in the first place does not contemplate a promise to marry



but those only which are made in consideration of marriage  
so that a promise between two persons to marry is binding,  
tho by parol. Bull. Ct. P. 286. 1 Font. 179. 2 Ray. 386.  
Stra 34. Rob. 190. contra 1 Sw. 65. 411.

This clause relates to

by in time to agreements made in consideration of mar-  
riage: by then are meant only agree<sup>ts</sup> in con-  
sideration of marriage & by way of marriage settlement  
or family provision, as an agreement by the husband  
to settle on the wife &c. This clause relates in  
add only to marriage settlement agreements. 1 P. W. 618.  
Pur Ch. 525. 1 Pow. 277. 8.

The rule introduced by the  
stat. requiring ag<sup>ts</sup> of this kind to be written ad-  
mits of no exception, unless in the case of part  
performance, of which I shall speak more at large  
hereafter.

It was once doubted whether a parol promise or  
agreement of this kind would not be binding if it was  
stipulated, that it should be reduced to writing. There  
certainly is no room to doubt, for such a consti-  
tution would enable persons to evade the statute. Pur Ch.  
252. 3 Atk. 554. 1 Cha. Ca. 135. 1 Pow. 274. 281. 1 W. 157.  
1 Eq. Ca. 1 P. W. 3. 4 Bro P. 245.

If however such a stipulation is made & the execution of  
it be prevented by the fraud of either party, & the mar-  
riage takes effect, equity will enforce the ag-  
reement. Eoff. does not rely on the ground of fraud  
only & no other. It is not because the contract is more  
binding or more entitled to the interposition of a court

of equity on the ground of this stipulation. But to prevent one party from defrauding another. In Ch. 526. 1 P. W. 618. 1 Eq. Ca. 19. Robt. 136. 7. 198.

When a fraud is say-  
 nizable in a court of justice, fraud is always admissible to prove  
 it. For written evidence of fraud is no more to be expected  
 than written evidence of theft or any other crime.

And a parol promise before marriage is a sufficient  
 consideration to support a settlement, or a servant for  
 a settlement made after marriage. Thus if a prom-  
 ises a settlement & marries without executing it, it will  
 be no defence for him to say that the marriage has  
 taken effect & <sup>that</sup> no consideration remains. for the stat  
 does not make a parol promise void it only prevents the  
 proof of it in support of an act. 2 Ch. 146. Stra. 236  
 1 Ky. Jan. 196. 4 Robt. 197. to 200.

It has been determined  
 that a letter signed by one of the parties is a sufficient  
 writing or agreement under the statute if it contain  
 the terms of the agreement. Indeed I can see it  
 would be suff. under any other clause of the stat.  
 for an agt. in form is not required. and such a let-  
 ter is a suff. memorandum or note as it recognizes  
 a former parol agreement. 1 Font. 179. 2 Vent. 361. Er.  
 Cha. 560. 3 Atk. 583. 2 Bro. Cha. 32. 1 Ky. Jan. 331. 3 B. 24. 318.

When however the  
 writing produced is in the form of a letter it must  
 appear that the other party to whom it was addressed  
 accepted the terms proposed in it & acted in con-



contemplation of them at the time of the marriage,  
 otherwise the letter will not be binding, for this is  
 not a written agreement delivered and accepted, but  
 a memorandum recognizing such an agreement  
 by parol. Hence in a case where the father of an in-  
 married wife wrote a letter to his daughter containing  
 an agt of a particular portion to be given her on her  
 marriage & the daughter did not show it to her husband  
 until after the marriage. On a bill filed in Eq<sup>t</sup> court  
 determined that the requisitions of the statute were  
 not complied with. The husband did not act in con-  
 templation of such an agreement at the time of the  
 marriage for he did not know of the father's propo-  
 sals so that there was no meeting of minds which is  
 so indispensable in the formation of a contract.  
 The same mutual consent being here requisite as  
 in other cases. 2 P. W. 65. 1 Pow. 287. 290. 9 Mod. 3  
 Robt. 107. 8. 192. 1 Fomb. 179.

And a letter written to  
 one's own agent stating the terms of an agreement  
 already made by parol with another is according  
 to the decision, a suff<sup>t</sup> note or memorandum of  
 the contract. Being an order sent to the agent for the pur-  
 pose of preparing for the execution of the contract  
 it cannot be termed an agt. but is an acknowl-  
 edgment in writing of the parol agreement which  
 amounts to a memorandum or note in writing pre-  
 scribed by the statute. 3 Attk. 503 Robt. 121.

Not a letter stating in general terms merely that a

parol agreement has been made, without specifying the terms, attes signed by the party will not be binding, for a contract signed by both parties may be too uncertain to bind, and much more certainty is required in a letter than in a contract direct between the parties. for in this the court can better judge of intention, in that more is left to be ascertained by parol testimony which opens the way for perjury. Thus a letter stating that A has agreed to make a marriage settlement on B, is an insufficient memorandum on account of its want of certainty or precision. *Per. Cha. 560. 12. 2 Eq. Ca. 17. Robts 136. 191.*

**IV.** Agreements of the fourth clause of the Stat. of *Winds & Pyrenis* are, in the words of the stat. contracts or sales of land, tenements or hereditaments or of any interest in or concerning them. There must be in writing or some note or memorandum of them in writing to support an act at Law or Eq<sup>l</sup>.

I have before observed that by the expression "contracts or sales of land" was meant a stated sales of lands or contracts for the sales. -

With regard to the import of the terms "land, tenements or hereditaments," it has been determined that a thing annexed to the land if sold in contemplation of a severance according to the contract is not included, so that a parol agt. concerning the sale of it is good. There was once that to be some contradiction in this but it is now settled & thus annexed



has been determined by <sup>2d</sup> ~~the~~ <sup>the</sup> Court to be in the nature of a challenge. The first question which arose on this rule, was with regard to a parcel sale of trees standing on the land, which was decided to be good. The next was a parcel sale of potatoes in the ground, there being so annexed to the parcel that the court held the sale not good on the ground that the soil must be broken to get at them, so the sale concerned land. The next question was on a parcel sale of grass growing on the land, which the terms "land, tenements or hereditaments" were construed not to include. A case occurred in Conn. of the parcel sale of the machinery in a mill which was held good 3 Loo. 65. 6 East. 602. 11 ib. 362. 2d Ray. 182. Bull. ch. P. 232 1 Bro. & Col. 394 3 Id. 476. Robt. 126. Res. Co. 214.

And there is a very common species of agreement by parcel in this country between the owner & the occupier of lands that the tenant shall occupy & improve and the crops be divided between them, the tenant raises the crops by the labour of the owner and half the crop is the rent which may as well be in specific articles as money. This is the same in Eng. 1 B. & P. 397.

And under this clause of the Stat. as well as under the former it is determined, that a parcel agreement is not binding, merely because it contains a stipulation that it shall afterwards be reduced to writing, and if it were there is no supposable case in which the parties might not avoid the statute. 1 Vern. 151. 157

1 Eq. Ca. 19. 1 P. W. 770. P. W. Cha. 202. 2 B. W. Cha. 555.  
565. 1 Pow. 281. 297.

It has been decided in Con. that a promise to pay the price or consideration money of land actually conveyed, is good tho by parol. for this contract is not a contract for the sale of land or any interest in or concerning land, the title to the land is already complete, & a mere promise to pay money is not within the statute merely because it is connected with a contract concerning land.

And it has been determined that a conveyance by deed raised an implied promise to pay the value of it. But it is now settled that when there is a conveyance of land without an express agt. to pay the consideration, no implied engagement can be raised. There is no decision in the Eng. books on this subject, owing to their strict method of conveyancing. 1 Root 77. 8. 479  
Brace & Cullen in Day.

It has been determined in Con. that a parol agt. by a grantor at the time of making the grant, to pay for any deficiency in the supposed quantity of land was within the statute void or rather that such a promise was void at C. L. "Phry & Cartwright." For at C. L. if a parol agreement, is made at the time concerning the same subject, be not introduced into the act it is void, the fact of part being reduced to writing & executed precludes either party from averring such parol agt. 1 Root 73.  
1 Day. 23.

But the generally inserted rule requiring



agreements for the sale of lands or of interest in them to be written admits of some exceptions, so that parol contracts of this kind may be enforced notwithstanding the statute.

And it may be laid down that a parol agreement of this kind is good notwithstanding the statute if it be provable consistently with the spirit <sup>& object</sup> of the stat. def. the rules of evidence. There is no inherent invalidity in such contracts. & the stat. does not affect an agreement as such it merely alters the method of proof. The agreement is not void in any case and when there is no danger of fraud or perjury it will be binding.

First then if one on a bill filed for a specific performance confesses the contract as alleged, there is clearly no room for perjury in proving the contract the incapacity of proof being superseded by the confession. And it has been expressly determined that such a contract shall be enforced. 1 Vy. 221 441. 3 N. Cha. 208 374. 2 Attk. 100. 155. 3 Attk. 3. 1 Bl. Rep 600. 4 Amb. 586. 2 Bro. Cha. 568. 6 Vy. Jur. 37. 554. 1 Cow 271. 292.

According to the current of those cases a parol promise thus confessed is binding & may be enforced. Mr. Pows. observes that the statute is satisfied since the promise is now in writing and admitted to. This reasoning is not satisfactory for a confession is no memorandum (said).

The principle of those decisions has been much questioned. But it is agreed that it depends on the facts.

confessed the agreement. does not insist or otherwise insist on the stat. he is bound then by parol. of this there is no diversity of opinion. 2 Bw Cha. 500. Peakes Ex 216. 4 Vy. Junr 23. Robt 156. 161.

It is agreed too that if Def<sup>t</sup> having in his answer confessed such an agreement; submits to any such decree as the court shall think itself authorized to make, Def<sup>t</sup> is bound & performance will be decreed.

But it has been a great question whether, if Def<sup>t</sup>, by admitting the agreement in his answer, insists in his plea upon the statute the contract can be enforced? L<sup>d</sup> Hardwicke determined it in the affirmative and his opinion is fortified by many weighty authorities. Pr. Cha. 208. 374. + 3 Atk 3 where L<sup>d</sup> Hard. says that Def<sup>t</sup> shall be bound if he confesses the agreement altho he pleads the statute. In 2 Atk 155 Def<sup>t</sup> did actually plead the stat. see also 2 Bw. Cha. 508 also 1 Bl. Rep. 600 where it is laid down generally & unconditionally that an answer confessing a parol ag<sup>t</sup> takes it out of the stat.

But there has been a contrary decision at law in the C.P. where it was holden that altho the Def<sup>t</sup> had confessed the ag<sup>t</sup> in his answer to a bill in equity for a disclosure, yet as he insisted on the stat. he was not bound in a c<sup>t</sup>. for damages for the non performance. 6 Vy. Junr 548. 2 other Bl. 63. Robt 157. 248

This same opinion has been asserted by L<sup>d</sup> Roslin late L<sup>d</sup> Loughborough & Ch. Bar. Eyre 4 Vy. Junr 23. 2 Bw. Cha. 563. 4



But in a case still more solemnly considered & deliberately argued [3 Bro. Cha. 559] *L<sup>d</sup> Thurlow* in his reasoning adopted the rule of *L<sup>d</sup> Mansfield*. And after much that gave it as his opinion that such a confession took the agt out of the stat. For the st. has not the effect of rendering void or of setting a parol contract at all, but merely introduces new rules of evidence for the prevention of fraud & perjury. When therefore no evidence at all is required, the contract is not within the spirit & objects of the stat tho it may be within the strict letter of it. And he observes that the whole effect of the stat is to prevent the D<sup>f</sup> from proving the contract by parol or "evidence" as he expresses it. In this opinion I agree with him in toto. & further. *Idem*. 569. *Robt*. 160.

It may be proper for me here to observe that that case in the decision of which *L<sup>d</sup> Thurlow* delivered that elaborate opinion was decided on the ground of uncertainty in the contract.

Our elementary writers treat this point as a *quæstio vexata*. *Robt*. says the weight of auth. is ag<sup>t</sup> the opinion of *L<sup>d</sup> Thurlow*. I do not think so. You will see the auth. collected in *Writ Pl.* 107. 211. 1 *Fent*. 170.1. *Robt*. 160. 238. *Peckham* 216.

I confess that it appears to me immaterial whether the D<sup>f</sup> pleads the stat or not after the confession. For it appears from the record that there was a parol agmt.

and as there is no danger of fraud or perjury thus bringing  
no occasion for witnesses the court should deter-  
mine the agt. good & not within the state. If  
a confession by D<sup>f</sup> without pleading or insisting on the  
stat will enable a court of Eq<sup>l</sup> to decree against  
him (as it is agreed) the agt. must be considered a good  
one under the stat as the decree could not be made.  
This decree must have stood on the ground that  
the confession takes the agt. out of the state. How-  
ever the D<sup>f</sup> after having taken the agt. out of the  
state by his confession, can he bring it back again  
by insisting on the stat? most clearly not. —

To be consistent  
therefore the court should determine that if any bond agt. can  
be enforced in consequence of a confession by D<sup>f</sup> when the  
it is not pleaded, it may be enforced when it is pleaded. I think  
it should not be enforced at all as enforced as well when the statute  
is pleaded as when not. The rule so often laid down that a  
confession takes the agt. out of the state would be perfectly  
negatory if a plea of the stat. could after bringing it back  
again.

It is also entirely unsettled whether D<sup>f</sup> in a bill  
for specific performance of a bond agreement in Eq<sup>l</sup>  
is bound either to confess or deny or make any answer  
at all. This was first determined by L<sup>d</sup> Allacres, held  
that D<sup>f</sup> must either confess or deny. L<sup>d</sup> Thurlow  
of the same opinion. 2 Bro Cha. 566. altit. Pl. 211. 214  
Contra. Robt<sup>t</sup> 156. 7. 166. 2 altit 155. 2 Bro. Ch. 24.

L<sup>d</sup> Thurlow said that  
the only effect of the statute was to prevent the D<sup>f</sup> proving a



a parole promise and that it was not against the spirit  
of the stat. to compel to compel the Def<sup>t</sup> to answer. 1 Port. 170  
124-125-126

It is in my view in a correct view of the statute for it is as  
not intended to prohibit Def<sup>t</sup> confession, or to protect  
him from it, but to prevent the introduction of paid  
testimony by Def<sup>t</sup>. The imagery will throw some  
light upon this subject. It does not declare parole  
agreements either void or voidable but merely re-  
fracts that no suit shall be maintained on them.  
The Def<sup>t</sup> is the only party protected by the stat. The  
authorities stand thus. L<sup>d</sup> Maclefeldt, Pearson  
Ellenfield & Harshwick hold in reception that  
the agt. is to be compelled or denied by Def<sup>t</sup> and that  
a confession on a bill for disclosure takes it out of the  
stat. On the other side are L<sup>d</sup> Longborough & as  
now Roslin. Ch. Bar. Eyre & Eldon. 2 Den. Bl. 68.  
In point of number the Chancellors & Ch. Justices  
are balanced. The subject is therefore open for dis-  
cussion on principle.

The reasons assigned by these latter  
judges does not appear to me to be relevant. They say  
that to compel the Def<sup>t</sup> to answer, is to tempt him to  
commit perjury. But according the acceptance of the  
stat in Westminster Hall, it is meant to prevent the  
Def<sup>t</sup> swearing a contract on Def<sup>t</sup> and I humbly  
conceive that perjury by the Def<sup>t</sup> was never contemplated  
by the legislature.

That there is another & a new considera-  
tion agt. those who hold that to compel the Def<sup>t</sup> to confess

or deny is to tempt him to commit perjury viz. That the same reason might be urged with equal propriety if the agreement were written. The temptation for Deft. would be equal in the two cases.

The stat. contemplates the prevention of fraud through the intervention of perjury as far as there is danger of its introduction by the Off. but no farther.

The whole question as regards this rule you will observe depends on this whether a confes<sup>n</sup> by Deft. takes the case out of the stat. I should decide both these questions in the affirmative. It is however unsettled and will remain so in Eng until an appeal is taken to the House of Lords. But upon principle I should think that a confes<sup>n</sup> by Deft. takes the case out of the stat. & therefore he ought to be bound to confess or deny the parol ag<sup>t</sup>. in Deft. just as he is to confess or deny other contracts. - 1 Fent. 168. <sup>allod. locus 150</sup> Agreement must be admitted or denied. 2 Bro. C.C. 566. but altho admitted if the statute be insisted on a specific performance will not be enforced. 14 V. 375. 1 Mod. 305.

I observed yesterday that a parol agreement respecting a sale of land be might be enforced in certain cases when the circumstances are such as to prevent danger of fraud in proving them. or in other words when there is no danger of fraud or perjury arising out of parol testimony.

Upon this principle it has been



determined, that a parcel contract for the purchase of lands at a vendor's sale before a master in Ch<sup>t</sup>. is good? for there is no danger of fraud? the officer is appointed by & confided in by the court. This rule seems well established.

And it goes to show that what I have formerly advanced is true viz. that the statute does not go to make a parcel agreement void, but makes it thus the method of proving it. And any parcel contract is good which can be enforced without danger of perjury. 1 Ky. 218. 220. 1 Hen Bl. 289. 1 Bro. Cha. 334. Robt<sup>s</sup> 115. 1 Cow. 271. 272.

And upon a similar principle <sup>a parcel</sup> agreement between the solicitors of the parties in a suit in Ch<sup>t</sup>. in a case of mortgage has been held good. The court reposes confidence in its own officers and Solicitors as well as others not under their oath of office. 3 Bro Cha. 334. Robt<sup>s</sup> 115. not

According to several opinions expressed by high authority, a parcel contract respecting an interest in land, if inferable from circumstantial facts in proof of which there is no danger of perjury may be enforced. Thus suppose a sale of land from A to B. the deed absolute & unconditional, but vendor continues in possession. Vendor owes obligation to the vendor instead of the vendee to him. He pays the taxes does not account for the profits, pays the interest of his debt &c. These notorious facts make clear the intention of the parties and the court will infer a

perol agreement, that the contract was to be treated  
as a mortgage. *L. Handwick, Talbot. Pow & Woodson*  
view of this opinion, there is however no precedent  
of the kind, and the rule depends upon a reception of  
dicta. *Pow Mort 68. Talbot 60. 3 Wood 429. 2 Atk 71*  
*2 Vez 376. Pr. Cha 526. 19 W 381. 2 Atk 527*

Other exceptions to the general rule  
are admitted on the principle that a statute is to  
be given force and ought not to receive such a con-  
struction as would protect & encourage fraud. Such  
a Stat is always to be construed liberally for the purpose  
of suppressing the mischief & of furthering the remedy.

Hence if one party to a perol contract would practice a  
greater fraud upon the other by not executing his part,  
than would result from a non-observance of the agreement,  
may be decreed against him notwithstanding the st.  
*Mob. 131. 2. 1 Bl. Rep. 600. 1 Fost. 171. 2. 1 Pow. 294. 6.*

Hence

it is a general rule that when a perol is made for the purchase  
of land is performed or is to be performed on one  
side at the request or with the consent of the other party  
the latter will be bound to perform on his side.

Thus a lease by perol for 20 years from A to B. B entered  
by the consent of A made improvements erected build-  
ings & incurred great expense. A then endeavored  
to evict him but on a bill filed by B for a spe-  
cific performance it was decreed that A should  
execute a lease in legal form for 20 years to B.

That B was a supplanter was not enough to ground the



decree. tint as he suffered from it's lying by & ref-  
 using him to incur that expense the court  
 will relieve on the ground of fraud. it. anc. it  
 1 Ky. 221. 3 Ctt. 100. Vin. 373. 619. 3 Vy. Pnt. 378.  
 7 ib. 341. Cha. 783. 1 Fent. 172. 1 Bl. R. 100.

Now it is perceivable  
 that if A was not compellable to execute the lease  
 he would avail himself of his own fraud for  
 his accepting or permitting B to perform those acts  
 was a fraud & is called so by the authorities. 3 Wood. 433  
 435. 2 Eq. Ca. 45. 9 Mod. 37. Par. Cha. 561. 1 Bro. Cha. 217.  
 1 B & Pnt. 397.

Mr. Gould indeed add another consideration  
 he observes that the acts done afford presumption evi-  
 dence of the agreement & thus diminish the danger  
 of paying. This however is not adverted to in any decision  
 and even here little or no weight, and could never  
 of itself support the decision, for the terms of the contract  
 are as entirely in the dark as if no act had ever been  
 done. 1 Pow. 309.

Under this rule relating to part ex-  
 ecution of part of agt. it has been determined  
 that the delivery of possession of land in pursu-  
 suance of such part lease or sale, is sufficient  
 part performance on the side of the vendor, as  
 he divests himself of the use & possession, to enable  
 him to force the purchaser to perform his part, of  
 paying the consideration and receiving a convey-  
 ance. 2 Vin. 263. 255. 2 Eq. Ca. 48. Cha. 783. 3 Bro. Cha.  
 207. Par. Cha. 518. 6 Bro. Par. Ca. 102. 7 Vy. Pnt. 72.

The payment by the purchaser of the consideration money or a part of it, has been determined a sufficient part performance on his side to take the agreement out of the statute, so that he could enforce it against the vendor.

This however has been doubted, because it is said the party may never back his money if the contract be not executed. The weight of authority however states to be the other way, 3 ~~Atk~~ 2. 1 Vry. 83. 222. 2 Vry. Jun<sup>r</sup> 720. 1 Bac 64. 1 Pow. 304. 305 Robt. 153. 5. you may see a continuity of opinion 2 Eq. Ca 46. 9 Vry Jun<sup>r</sup> 234. Lagden 74 to 81. Com. Con. 82. 1 Maddock 503.

The payment earnest by way of binding the bargain is not such a part performance or execution as to take a parol agreement <sup>concerning land</sup> out of the statute, for it really is not intended as part performance, it is a mere solemnity or solemnity like shaking of hands and it is because it is a mere form of stipulating that the courts do not consider it a part performance. Per. Cha. 560. 1 Font. 175. 2 Eq. Ca abgt. 46. 12.

Mr. Powell says that where <sup>earnest</sup> money has been paid by the purchaser on a parol agreement for the purchase of land an action at law may be maintained for damages accruing to him by non performance, he however cites no authority, and I venture to say there is none, for if the position were correct it must follow that the payment of the money takes the parol agreement out of the statute. The fact is the party who paid the money may recover



it back in an act for money not received which would be in disaffirmance of the contract. 1 Cow 338.

On this point as to pay<sup>t</sup> of money a question has arisen which Powell treats as unsettled, whether the receipt of money or pay<sup>t</sup> of money in part performance of a parol ag<sup>n</sup> might itself be proved by parol.

It would seem strange that a rule should exist by which a parol contract might be taken out of the state by pay<sup>t</sup> of money in part performance and still it should be necessary to show a writing to prove the pay<sup>t</sup>.

For if a receipt were shown a receipt to be shown, if it were only a general receipt it could have no bearing at all on the contract, for it would prove nothing, and if it were specific concerning the terms of the agreement, the rule above mentioned as to part pay<sup>t</sup> would be entirely negatory for this receipt would be a note or memorandum within the state. 1 Cow. 307. S. Robt. 1834. La Mart says the receipt may be proved by parol and in 3 Ctt L. is a case where it was actually done. Indeed such a thing may always be proved by parol for it is a fact, to be proved by parol as much as a crime.

But to take a parol agreement out of the state by part performance, the act done or claimed to be done in part performance must be such as would produce the party performing.

or claiming under the ag<sup>t</sup> if the contract were not executed. such as would not leave him in statu quo. or such that the other party would practise greater fraud by not performing his part than would arise from a mere breach.

However a mere part performance is no ground of taking a parole ag<sup>t</sup> out of the statute. Thus suppose the consid<sup>n</sup> of land paid & the buyer should wish to rescind his bargain. the seller could not prevent it, for he has done nothing by which he could be injured but the buyer does not remain in statu quo 6 Bro. Par. Ca. 45. 7 Vez Int. 341. Robt. 138. 162. An act perf. by one of the parties does not constitute a donee.

Also it is required that the act claimed to have been done in performance be such as in the opinion of the court would not have been done, but with a view to the performance of the agreement. So if the act done be such as the party would have as soon done without reference to the contract as with, the court will not regard it as part performance.

So if a parole ag<sup>t</sup> be made with a tenant to renew the lease, his continuing in poss<sup>n</sup> will not be considered as part performance of the ag<sup>t</sup>. It is not unusual for tenants to hold over, but did not remove for the purpose of taking possession, nor has he done any act or obtained from any right which is right part performance to take the case out of the statute. 1 Pow. 309. 3 Atk. 4 & 586. 1 Br. Cha. 561. 1 Bro. Cha. 412. 3 Vez Int. 378 1 Atk. 12 3 March 561.



I observed that delivery of possession by vendor under a parcel ag<sup>t</sup> for the sale of land was suff<sup>t</sup> part performance on the part of the vendor, but merely giving directions for drawing surveys, viewing & exploring & surveying the estate ascertaining its boundaries &c are not regarded as part performance. They are merely introductory or ancillary to a purchase, made to obtain information concerning the subject, and not in performance of any stipulation relating to the sale.

6 Bro. Pac. Ca. 45. Amb. 586 1 Bro. Cha. 412. 1 Font. 175.  
3 Vry. Ann<sup>t</sup> 34. 377. Gilt 41.

In the case of marriage settlement agreements, the marriage itself is not considered as part performance of the agreement as between the parties to it. For by the terms of such contracts, they can have no effect unless the marriage does take effect, and if that were to be deemed part performance every ag<sup>t</sup> of this kind would be taken out of the state, and treated precisely as at C. L. Pu. Cha. 561. Cha. 738. 1 P. W. 618. Rot<sup>t</sup> 196 to 198. 1 Pow. 309. 1 Mac<sup>t</sup>.

But, it is said that a parcel agreement entered into by a third person as the father of one of the parties, is taken out of the state, by the marriage, provided it takes place with his consent. Thus if the father of the husband agrees by parcel to settle a certain estate on the wife & the marriage takes effect, the wife may enforce the ag<sup>t</sup> & the father would be bound both the parties to the marriage. 2 Vern 373. 1 Pow 297. 8. 302 300.

There is a case in 1 W. 297, supposedly decided on the ground of part performance which Mr Gould says is unintelligible to him. Where the agt was for \$500 to be apportioned to trustees for widow use during coverture & subject to her appt. she enjoyed the benefit of it and her aborigine brot a bill for writings to be executed according to former use part performance on an side will not enable the party receiving the exclusive benefit to enforce the agt. but see 1 W. 297 1 Pow. 304.

And it has been determined that cutting timber trees for clearing land erecting buildings &c in pursuance of a parol marriage settlement agt. was suff. part performance to take the case out of the stat. 2 Eq. Ca. 29. 1 Pow. 304.

You have had many decisions in Con. on the subject of pay<sup>t</sup> of money, constituting an aff. & al part performance. By the latest decision however. pay<sup>t</sup> of <sup>part of</sup> the consid<sup>n</sup> money & repairs made by the vendor are determined suff. to take the agt. out of the stat. 2 Decy. 225.

And upon the same ground principle of prevent<sup>n</sup> fraud any written contract respecting an interest in land or any other subject in deed may be contradicted by proof of a parol agt. when such proof furnishes evidence of fraud in the execution of the instrument. & parol proof is always admitted to move fraud in the ex<sup>n</sup> of an instrument. for the signing & sealing & delivery is proved by parol. Thus a & B contract



was a mortgage. B having received the absolute deed  
refuses to execute the defeasance, clearly ruled that  
A should be admitted to prove what the parole agt.  
was, for that may as well be proved as any other  
fact for the purpose of showing the fraud.  
3 Cttk 389. 1 Fent. 188. 1 P. W. 620. 2 Cttk 203. 1 Eq.  
Cas. 20. 1 Law. 244.

And in another case where the party could  
not read (a markman X) an complaint of  
fraud he was admitted to prove the parole agt.  
3 Cttk 389.

A parole agreement may be proved in any  
case where it is an inducement to an action at law  
for fraud. for the action is not founded on the parole  
agmt. tho it may be indispensable to prove it. It is but  
one of the instruments by which the fraud is brought  
about, so that proving it is nothing more than  
proving the fraud itself. We had much use for this  
principle in Con. at the time of the great land  
speculations 2 Dev. 531.

Under Stat. 11 Geo. 2. an act of indet.  
agt. will lie upon an implied promise to pay for  
the use & occupation of land & if there was an ex-  
press promise made for the rent, that may be given  
in evidence for the purpose of ascertaining the  
value of the use or amount of damages. So that  
the party may prove not only an express parole agmt.  
but facts from which the law will imply an  
agt. 8 T. Rep 327. 2 Bl. Rep. 1249. 1 T. Rep 378.  
1 Wils. 314. 1 Hen Bl. 235. Esp. Dig. 20. 165.

We have no such stat in Can. but our courts have adopted the rule of the Eng. courts & the same wisdom may be improved here as in Eng. And I do not see the necessity of the stat at all. It is not action to enforce the sale of land or of any ag<sup>t</sup> in or concerning lands. It is merely a remedy by which one who has permitted another to occupy his land may recover his rent. 4 Day. 228

By 22. a<sup>t</sup> would not lie for rent. Debt was considered the proper action whether rent was due by deed or parol. I have seen no other reason assigned except that debt was the higher remedy. it does not appear to me so. for a<sup>t</sup> is certainly the most remedial action known to the law, however the rule is well established. Dutton 34. Hob. 284. Cro. Eliz. 242. Cro. A<sup>t</sup>. 598. 414. 3 Woodd. 152. Bull. ch. P. 137. Peake, Ev. 241. 2 Com. Com. 509. Esp. Dig. 20.

V. Agreements of the fifth class contemplated by the statute are those which are not to be performed within a year from the time of making. In other words parol evidence is not to be admitted in support of an act or an ag<sup>t</sup> which is not to be performed within a year.

So that if one promises to pay money or do any act 13 mo's or two years hence. it is an ag<sup>t</sup> within the stat.

In the construction of the statute it has been held that this clause does not extend to



any agreement respecting lands. I suppose because the releasing clause contained all the provisions intended to be made on that subject. Since under that clause such agreements are in part of no effect when they were to be performed within a year unless they were written, 1 Vin. 159. 3 T. Rep. 327. 1 Pow. 276.

But when by the terms of a parol agreement, the performance is to take effect upon the happening of some contingency which may or may not happen within a year, it is not within the stat. Thus a promise to pay money on the return of a ship is good, because it may take place within a year. Galk 280. Bull. at 9. 280. 3 Barr. 1278. Sta 506. 3 Galk 9. 2 Galk. 316. 672. Carter, Ex. 214.

On the same ground a parol promise by A. to pay a certain sum as \$1000 to B on his marriage is not within the st. So if he promise to leave B \$100 on his death, both on the same ground. 3 Barr 1278. Bull. 280

If then the terms of the agreement are such that they may require within a year, at any rate, to be performed, they are not within the stat. altho actual performance is not required till after it is due.

And to make the contract binding there is no need of the contingency actually happening within the year, for the agreement must be considered as binding or not at once. Thus if the contingency be the arrival of a ship from India altho she does not arrive until after 27th June it is

still the ag<sup>t</sup> is not within the stat. Lewis supports  
an act 3 Burr. 1281. 2 Ray. 317.

This clause then  
extends then to those contracts, which according to  
their ~~express~~ terms are not to be performed within  
one year. as if I promise to pay \$100. 15 mo. hence,  
it is within the stat. 3 Burr. 1281. Peake Ec. 214.

And now as to ag<sup>t</sup> of this kind it has been determined  
in Cerr. that when the promise is made upon a continuing  
& accruing consideration it is not within the stat. if it is  
to be performed according to the terms of the agreement with-  
in one year from the time the consideration is complete or  
consummated. Thus a promise by one to pay for boarding  
his son five years is not within the stat. But if the  
contract was now made for boarding 5 y<sup>r</sup> & the promise  
to pay 7 y<sup>r</sup> hence it would be ill. If however the pay<sup>t</sup>  
was to be made 6 y<sup>r</sup> hence it would be good for that  
is within one year from the time of consid<sup>n</sup>. complete.  
1 Root 89.

There are no decisions of this point  
in Eng books that I have seen.

Omitting the 5<sup>th</sup> clause  
of the Eng. stat. I have now to mention. Certain  
rules applying indifferently to the diff<sup>t</sup>  
classes of contracts contemplated by the  
statute. if any one of these rules is not of your ap-  
plication its singularity will be mentioned.

I would  
perceive that the construction of this stat. as of all  
other statutes is the same in Eng<sup>d</sup> as at Law tho the



the mode of affording relief may be and generally is different in the two courts. 1 Foul. 22. 3 Bl. 430.

Our first inquiry is, What is an agreement in writing or a note or memorandum of an agreement in writing.

It is not expressly decided but I think it is only inferable from the authorities, that any writing which is intended to furnish evidence of a contract is a written agreement or a note or memorandum of it within the meaning of the statute.

It has been determined that a letter written by one of the parties acknowledging the contract & stating the terms of it, is a note or memorandum of the agreement. 1 Foul. 179. 2 Bro Cha. 32. 3 ib. 318. 3 Bth 503. 1 Vern. 201. 2 ib. 322.

And where there is a note or memorandum of an agreement that may be made certain if necessary by reference to other documents or even to extrinsic facts.

This however is to be understood of those cases only in which the writing makes express reference to some other documents or facts. Thus a lease goes to transfer certain lands, which are described in such a deed or record, reference is made to the deed or record to ascertain the subject.

But such reference could not be made unless the instrument or memorandum itself had referred to it.

Further to simplify the rule as it relates to reference to extrinsic facts. A agrees in writing to convey land to B. for the same price that A gave for it. parol proof may be admitted to ascertain what that was. 3 Bro. Ch. 318. 1 Vy. Junr 330 2 B & P. 238. Robts. 107. 115.

But when the written agreement refers to something extrinsic by which it is to be made certain, If it is not made sufficiently certain by such reference no parol evidence can be admitted to make it more so. As if an ag<sup>t</sup> were to convey land described in a particular instrument & that inst. proves to contain no description of land whatever. the ag<sup>t</sup> is void from uncertainty for the party claiming under it cannot resort to other evidence to ascertain it. 1 Vy. Junr 326 Robts 108. n.

And an advertisement either written or printed by one of the parties containing the terms of the proposed ag<sup>t</sup> is sufficient note or memorandum in writing to bind the party. Thus A advertises that he will convey such lands for such a day to the person who will pay him \$1000. B with the money in hand may demand a conveyance. 1 Bl. Rep. 599. 3 Burr. 1921. Kirk 14.

It is true indeed that it must collaterally be proved to have been made by him whose name it bears but so must a deed or any other instrument.

And it is a general rule in the construction of this statute that the considera-



tion as well as the promise must appear in <sup>the</sup> writing. This rule is founded in the construction of the word agreement, which is defined to mean all that enters into the contract on either side. 5 East 106 ib. 307. Robt. 116. 207.

There is an exception under this misinformed construction of the last clause of the Eng. state, relating to the sale of goods of the value of £15 or upwards, the consideration of which need not appear in the writing but may be proved by parole.

<sup>This</sup> exception arises from the phraseology of this clause which is different from that of the other clauses of the stat. in all other parts of the stat. the words used are "agreement or some note or memorandum of an agt." in the last clause the word "promise" is used instead of agt. 6 East 307. Robt. 117.

<sup>And an</sup> instrument in the form of a deed & intended to take effect as such, but failing from the omission of some requisite, or by a change in the situation of the parties, may be considered in Est. as an agreement or evidence of an agreement in Est.

<sup>Thus</sup> under our state, suppose a deed with tests and witnesses or without an acknowledged signature, although such an instrument will not pass here as a deed yet Ch. will consider it as an agt. or covenant in writing, to make a good & valid conveyance, & will enforce grantor to perform it.

So also where a man gave a bond to a woman whom he afterwards married, conditioned to convey land to her. The rule of Law destroyed the bond, for the penal part created a debtum in present. But in Eq. the condition would be considered as a covenant to convey which it would enforce Robt. 109. 2 B.M. 242.

Every agreement imports the privacy & mutual assent of both parties. Hence a memorandum by one party or his clerk, in his book, stating the terms of an agreement, will not be regarded as an agreement or note or memorandum in writing, for it is not an agreement executed, nor is it a letter from one party to another. 1 C. 10 497. Robt. 109.

Our next enquiry is, What is a signing within the Stat.

It has long been determined at Law that not only a subscription at the bottom of the instrument, but the name of the party to be bound written any where in the instrument is a sufficient signing, if it was intended to give authenticity to the writing. Thus "I A. B. agree with C D &c." written by A. B. was considered sufficient signing. Stra 399. 2 Ray. 1376. 3 Lev. 186 & Vir. Jour. 249 2 B. & P. 238. 1 Esp. R. 119.

But when the name of the party in the body of the instrument appears not to have been intended to give it authenticity, it is not a sufficient signing. Thus A agreed to buy & wrote directions with his own hand to the scrivener thus. "B to pay Kings tax & also to pay A &c" this



was held not a good signature, being applicable to parties alone purposes & not intended to give authenticity to the whole instrument. 1 P. W. 771. 1 Pow. 285. 1 Foul. 166. 7. 1003121.

There was formerly a deal of looseness in the construction of the word signing, and it was once thought that one party making attestation in a written draft was suff. to signing, but this opinion has been overruled. 1 Vinn. 220. 1 Foul. 165. 6. 1 P. W. 770. 1 Pow. 284.

But a man signing as a subscribing witness, the party knowing the contents of the writing, is a suff. signature to bind him to any stipulation in his part recited in it. As when the mother of one of the parties to an intended marriage, signed as a subscribing witness a marriage settlement agreement in which it was stated that she was pay. £1000, she knowing the contents, & being privy to the marriage, she was held bound by the instrument as an agreement in writing signed by her & obliged to fulfil the stipulation. 1 Wils. 318. 1 Vy. 6. 1 Pow. 284.

The question which occurs on this decision is, did the mother intend by her signature to give effect or an authority to the instrument, the agreement being between other persons as principals? To this it may be answered that she is to be considered under the circumstances as having attested that part which related to herself.

By whom must an agreement be signed. The  
stat. provides that an ag<sup>t</sup> to be binding in law  
must be signed by the party or his agent duly au-  
thorized.

And it is suff<sup>t</sup> if the party against whom the  
remedy is sought signed it. if it be proved that there  
was an acceptance by the other party or that the ag<sup>t</sup>  
was acquiesced in or approved by him. So that it  
is not necessary for both to sign. 1 Bro. Cha. 564. 9 V.  
Jen<sup>t</sup> 351. 2 Vern. 373. 1 Eq. Ca. 20. 2 id. 32. 7 V. 100.  
2 G. 5. Hobbs 115. 1 D. 2. 2 id. 117.

Thus A & B made an ag<sup>t</sup> & A procured B to sign  
the writing without also signing it himself. the signing  
was held suff<sup>t</sup> by him ag<sup>t</sup> whom the remedy was sought.

It has been said indeed that A is also bound tho  
he did not sign. and that B could enforce perform-  
ance. But the reasoning in support of this position  
all good thinkers entirely unsatisfactory. see however  
1 Pow. 287. 1 Eq. Ca. 21. 2 Cha. Ca. 164.

But still if  
the party who has not signed bring his bill for  
a specific performance ag<sup>t</sup> the party who signed  
he is bound by the ag<sup>t</sup> for he thus recognizes and  
virtually affirms the contract. Indeed a court of  
Eq. would now enforce it, unless the party apply-  
ing would perform his part. 1 V. 82. Rob. 124.

It has also been laid down as a rule in great towns that  
an auctioneer, subscribing the name of the highest bidder



as to his acct. sales. with the price &c. was a suff.  
 signing to bind both parties. bring down after  
 the sale. for then he acted as the agent of both.  
 1 B.C. Rep. 599. 3 Bur. 1921. Balr. N.P. 280.

But this  
 rule in these goods laws has been since denied 8 T.  
 Rep. 151. when it was determined in T.B. R. that the  
 signing by an auctioneer, would not bind the parties  
 except under the last clause of the stat relating to the  
 sale of goods of the value of £10 or upwards. 1 Esp. Rep. 107.  
 1 B.C. Rep. 306. T.Vy. Junr. 344. 1541. It has been laid  
 down again in Esp. that the first goods rule is correct  
 without this restriction. so that the rule is not settled.  
 9 Vy. Junr. 249. 7ab 115.

It has been doubted indeed whether  
 sale at public auction, even in any case within  
 the statute, the transactions being public & notorious  
 there is said to be little or no danger of fraud  
 in proving them made. id. at P.

But this doubt does not seem  
 well supported. either by good authority or a reasonable  
 construction of the stat. For there is certainly as much  
 confusion and danger of mistake in public sales  
 as in private agreements. see however 1 B.C. Rep. 600.  
 Bull. et P. 280. 1821

A printed signature may be as ef-  
 fectual as one that is written. Thus it has been  
 determined that a bill of parcels delivered out by a com-  
 merchant who used printed bills, was well signed. It  
 being proved that he delivered it out as his signature

which in all cases is equivalent to signing it with his own hand, for he may order another to write his name. 2 Bt P. 238. Robt 124.

When the writing is signed by an agent, it is not necessary that the authority of the agent be shown in writing. He may be empowered by parol. The stat requiring the agent in writing, relates to the creation of an authority that remains as at C. S. Thus a merchant can bind his principle without such written power. 3 Mod 427. 9 Hy. 251. Vin. 44. com. H. 45.

For is it necessary that the identical contract or instrument in question should be signed at all. It is sufficient if there is an agent written or a note of it, and that is acknowledged by some memorandum or letter that is signed. Thus when A writes & signs a letter in which he acknowledges the agreement, this was held a good signature to the agent altho his name was written on a diff<sup>t</sup> paper. 2 Bw. Cha. 318. 3 Atk 503. Robt 121.

Indeed this point was decided in a case where the letter was written to the party or agent.

The mere writing of an agent by his own hand does not dispense with the necessity of signing. The stat requires not merely that the agent be written but signed. It was once thought that a man selling his own land by attending or writing it himself was not sufficient sign but it is now settled not to be. 1 P. Wm. 770. Robt 121



Of the consideration necessary to support a contract. A contract is defined to be an agreement between two or more persons on a suff<sup>t</sup> consideration. According to this definition it is of the essence of a contract at C.L. that it be founded on what the law deems suff<sup>t</sup> consideration.

A consideration is the material cause of the contract or inducement, or, it is that on a acct. of which each party is induced to give his assent to the ag<sup>t</sup>. 2 Bl. 443. 4. 1 Pow 330

Considerations as known to C.L. are of two kinds good & valuable.

A good consid<sup>r</sup> is that of kindred or natural affection between man & relations. As when a father in consid<sup>r</sup> of natural affection makes a gift to his son, this is called good consideration as contrasted from valuable. 2 Bl. 297. 4 Ld. 3 Co. 83. 1 Hent. 337. 1 Pow. Com 361.

And a good consideration in an executory contract is suff<sup>t</sup> as between the parties but as ag<sup>t</sup> creditors or after bona fide purchases for a valuable consideration, the consid<sup>r</sup> would not support the contract. Thus if a father in consid<sup>r</sup> of love & natural affection should make a gift to his son, the conveyance would be good ag<sup>t</sup> the father but if at the time of the conveyance the father was insolvent in debt, the son could not hold to the use of his creditors, whose claims are strictly j<sup>u</sup>ris. Or if the father were afterwards to make a conveyance to a son a fide purchaser

for a valuable consideration, the purchase will hold to the exclusion of the son. 2 Bl. 297. See further on this subject under the head "fraudulent conveyances".

And an executory contract forms and as a good consideration in many cases be enforced in Eq. but in the imposition of this court is in a great measure discretion any no precise rules can be laid down on the subject. 1 Km. 227. 2 P. W. 176. 1 Pow. 311.

A valuable consideration is one which consists of something that possesses pecuniary value, as money, goods, real estate, labour performed & marriage, a settlement made before marriage &c. consideration is good against every one. Wood. 243. 3 Co. 83. 2 Bl. 217.

And upon this principle a promise in consideration that one become my surety for a debt that I owe, for prolonging my credit or to become my co-surety, is good, as to pay money or to indemnify. 1 Burr. 482.

Under this view of the subject it becomes necessary to consider the two kinds of contracts known to the C. L. viz. special and simple for by C. L. all contracts are either special or simple. 7 D. Rep. 351.

A special contract is one which is created by specialty, i.e. by deed or writing under seal the contract is termed special because it is evidenced by specialty or the legal solemnity of sealing. 1 Inst. 171. 2 Bl. 295. 465.

A simple contract on the other hand



is one which is evidenced by parol merely or by a writing not sealed. It is the seal then or the want of it which determines the character of the contract at C. L. for the C. L. knows nothing of the distinction between written & unwritten contracts. 7<sup>th</sup> Ed. Rep. 351 note. 2 B.C. 465.6. Rob. Fr. Con. 99.

A contract by parol & a writing not sealed are in point of solemnity precisely upon the same footing at C. L. A writing not sealed in strictness is not considered as constituting the contract, but as mere evidence of a parol agreement, and is so treated in all pleadings. The pleader makes no profit of it. & it would be useless for you like to do it. But a specialty must be declared upon & profit made of it.

A writing not under seal is not to be declared upon the ag<sup>t</sup> is to be mentioned as if resting entirely in parol, and then the writing deduced in evidence.

In Con. however instruments containing express promises or covenants whether sealed or not are treated in gen<sup>l</sup> as specialties. There has been much discussion of the question, how far this rule extends. Bills of Ex & negotiable notes are treated as in Eng. like simple contracts.

But an old fashioned promissory note is but a specialty, implying a consideration, which Eng<sup>l</sup> cannot deny. Our practice was probably founded in the form of action prescribed by an old statute, denominating the action assumpsit, yet founding

it an expressly & direct propert. 1 Swift. 373.

and it

simple contract is clearly not binding without consid<sup>er</sup>  
contracts without consid<sup>er</sup> are deemed *nuda pacta* which  
not support an action. "*Ex nudo pacto non oritur  
actio*."

In a moral point of view a contract <sup>and consid<sup>er</sup></sup> may be  
just as binding as one with. that is conscience, but  
the former are never enforced by law. On the principle  
that the municipal law never enforces a duty of im-  
perfect obligation. 2 Bl. 445. Salk. 129. Plow. 302  
309. 1 Fent. 326. 333. 5 T. Rep. 143. 1 Pow. 330.

There has been some

confusion introduced by the looseness of argumentation  
used by the C<sup>t</sup>. of B. R. in the case of *Pillans & Van  
Ellisop*. All I will note observed that: a written con-  
tract (without mentioning seal) is good at C. L. without con-  
sid<sup>er</sup>. 3 Bur. 1579. see also 2 Bl. Com. 446. 2 Pow. 242.

But this prop.

osition in the extent that it is laid down is clearly  
not supportable, it is too broad. The reduction of a  
contract to writing does not dispense with the neces-  
sity of consideration.

Blackstone appears to agree in the  
proposition, but the example put by him does not  
support his doctrine. He instances a promissory note.  
For unless it has been negotiated and the question does  
not arise between the orig<sup>l</sup>. parties, the consid<sup>er</sup> must  
appear, precisely as if there had been no writing in the  
case, (that is if the act<sup>l</sup>. be between the orig<sup>l</sup>. parties) The



it is true that when it has been negotiated the con-  
sideration cannot in general be questioned, yet this  
rule is founded in the great principle of negotiability  
so important in the Law Merc. which is diff<sup>r</sup>  
from & forms an exception to the genl. rule of 3. 2.  
So that it does not prove that by receiving a prom-  
ise to writing the necessity of consid<sup>r</sup> is dispensed  
with. As will more fully appear on examination of the  
following authorities. 7 T. Rp. 121. 351. Kid. Bils 155.  
3 T. Rp. 421. 757. 1 Fent. 335. 1 Pow. 341. 2 ib. 242  
2 T. Rp. 71.

And in strictness as well as in judg<sup>t</sup> of  
law a consid<sup>r</sup> is as necessary to a sealed contract  
as to one not sealed. Thus to a penal bond or a single  
bill there is a consid<sup>r</sup> in judg<sup>t</sup> of law, true, indeed.  
Plff is not bound to prove it alimede or by extrin-  
sic evidence, neither can Def<sup>t</sup> when sued upon such an  
instrument aver the want of consid<sup>r</sup>. But neither the  
one nor both of these facts prove that no consid<sup>r</sup> is  
necessary to the validity of such instruments.

Therefore

why Plff is not bound to prove a consideration, is that  
the solemnity of the instrument implies one, or from  
that solemnity the law implies one, and the Def<sup>t</sup>  
cannot even want of consid<sup>r</sup> bring estopped to do it  
by his own act, such an avowment would be in  
contradiction to an implication which the law  
from an instrument under his own hand & seal.  
That the solemnity of the instrument implies a consid<sup>r</sup>.  
vide. 1 Ry. 514 3 Barn. 1637. 1 Fent. 334. 2 Bl. 445.

1 Pow. 232. 3 and that defn. is estopped from  
 the arguments by estoppel. 2 Bl. 295. 4<sup>th</sup> Ray. 729. 1550  
 1 Pow. 344. 2 S. Rep. 577. 1. 4 Bl. 344

The result of these observations  
 is namely, that on principle a consideration  
 is necessary to the validity of every contract at C.L. whether  
 a specialty or not. And that a specialty is binding un-  
 less the want of consideration appears in the instrument  
 or some other writing or thing which is part of the  
 contract. Robt. Fr. Com. 95. 97

But the rule that a consid<sup>n</sup>  
 is necessary to every contract applies in its full extent to  
 all contracts only. For when the law says that a consid<sup>n</sup>  
 is necessary to the validity of a contract. It in genl.  
 means only this, that it will not enforce contracts  
 that have no consideration. So that the rule applies  
 to such contracts only as are to be enforced by law.

A contract without consideration, voluntarily entered  
 into execution by the parties themselves, as by delivering  
 over the subjects contracted about, is good as between  
 the parties themselves. As if I promise to pay money  
 without consid<sup>n</sup> I am not bound. the promisee  
 cannot enforce the contract. if however I promise  
 & actually deliver the money I am bound. The  
 promisee has no occasion to sue for performance.  
 & the law will not rescind a contract thus vol-  
 untarily executed tho it will not enforce it as  
 long as it remains ext<sup>t</sup>.

The rule then does not go to



the state of rescinding such contracts, when rescinded, because there was no consideration. But it leaves the parties as it finds them, "in statu quo" Doug. 20 21. Sha. 955. 1 Bac. 238. Esp. Dig. 577. 7 Co. 40

As to the mode or ways in which a consideration may arise or accrue. It has been said that it can arise or accrue only in one of two ways.

First from something advantageous to the promisor or the party undertaking to perform the act, or to pay the money. Or Secondly, from something disadvantageous to the promisee or party in whose favour the promise is made. This rule is too narrow, 1 Fent. 336. Comp. 292. 294. 1 How. 342.

In the first place then it is agreed that a consideration may arise from something advantageous to the party undertaking or promising. As when A engages to pay money for certain goods to be delivered to him by B. such is to receive a consideration for what he performs.

And by the way, by C. L. the quantum of consideration is not material. I am speaking you will observe of the essential requisites of a contract. The law does not regard the proportion between the consid<sup>n</sup> & the undertaking it is immaterial how disproportionate the one may be to the other. a piper can is a valuable consideration & will support any undertaking. A much

however has been determined to be of no value & will not be a consideration. 1 Mils. 230. 2 Vry. 518. 2 Vern. 213. 2 Pow. 152.

Idle & insignificant acts are not deemed in law to be considerations at all. Thus a promise to pay a man a sum of money, provided he does not drink in 36 hours, or laugh in 24 hours. 2 Rolle 23. Cro. Ely. 206. Esp. Dig. 74. 1 Cow. 335.

But anything to be done by him to whom the promise is made however trifling in importance it may be, is said to be sufficient way of consideration. Thus a farmer promised to pay the assessor of rent if he should show him the lease, this was not idle or nugatory, & assessor was bound on his promise. Cro. Ely. 67. 150. Cro. Ch. 70. Dyer. 272. 1 Pow. 343.

And it has been decided in an case that the remuneration of a Lord's Tenant is sufficient consideration to support a promise. The Lord's Lord declared that he was his tenant "I am sure I think I undertook to carry away certain things from his farm, as sheep madders &c. This decision in B.R. 3 T. Rep. 373.

On the other hand a consideration may accrue from something disadvantageous to the promisor, or party in whose favour the undertaking is made. Thus a delivery of a bond up to be cancelled, on a promise that C. will pay it. this act was of no advantage to C. but disadvantageous to it unless B performed his promise.

For it is not to be inferred from the rule that taking the con-



and action on the one hand & the promise on the other the whole transaction is to be disadvantageous to promisee it is not necessary for the validity of the consid<sup>n</sup> that he be damaged in any way. for if so no consideration would be good unless he had made a bad bargain. The rule is merely that the act to be done should of itself & alone be disadvantageous to promisee. ~~See~~ by voluntarily burning the bond & lost his debt ag<sup>t</sup> B. but that was really of no disadvantage to him if it was the procuring cause of C's paying him the amount of it. Hob. 4. 5. 216. Cro J<sup>3</sup> 342. Cro EG 745. 241 581. Corp. 128. 1 Foss. 346.

Admitted that according to some formerly supposed universal, a sufficient consideration in law could not arise except in one of two ways viz. from something advantageous to the promisee or disadvantageous to the promisee.

From this rule and as a consequence from it, it is established that a contract is not supported by a consideration altogether past & executed. because it is not at all advantageous to the promisee or disadvantageous to the promisee. the consideration of not having formerly paid me my money without my having any claim against him he was indebted to promise to pay him a certain sum of money my promise is not binding. there is no subsisting consideration whatever. it is now neither advantageous to him nor disadvantageous to the other. there is no previous debt or duty. and my promise was not the procuring cause of the consid<sup>n</sup>.

Or suppose that he having formerly

don't any gratuitous act for me and I promise to pay him something in consequence. my promise is not binding for there is no benefit to me or disadvantage to him, or rising by way of consideration out of my promise. that is my promise is not the procuring cause of the consideration. Plow. 5. 302. Cro. Ely. 741. 885. 2 Bulst. 73. 1 Roll. 11  
Esp. D. 87. 95. 1 Pow. 328.

But when the consid<sup>n</sup> is not altogether past & executed. (that may be so in part. it will be suff<sup>t</sup>). Thus when before in consideration that before had occupied & paid out promise to save him himself. or indemnify him of all damages. this promise is binding because the before was to continue prop<sup>r</sup> & pay rent. so the consid<sup>n</sup> is not entirely past. Cro. Ely 94. Cro. Ch. 497. 2 Bulst. 73. 3 Talk 96. 1 Pow. 349. 50

the rule above laid down, that a consideration already past will not support a promise is too narrow. for such a consid<sup>n</sup> will be good if there was a previous legal duty incumbent on the promisee

thus if one in consid<sup>n</sup> of a previous debt promises to pay. the rule does not apply for there is a previous <sup>and</sup> duty. as when A promises to pay B certain expenses incurred in bringing the child of A. A being under the duty of parents to bring their children by 47 Ely. A was held bound. for B discharged A's duty paying what A might have been compelled to pay. 1 Roll 413. 1 Chon 198. Ray. 260 Cro. Ely 138. 3 Burn. 1571.

So also if there was a prior moral obligation on promisee it will



be sufficient to support his promise. Thus if a promise is made to pay a just debt barred by the stat. of limitations it is binding. For a debtor is doubtless under a moral obligation to pay his creditors & the consid<sup>n</sup> the law will support the promise. 1 Font. 336. Ray 257. 2 Bl. 245. Comp. 290. 294. Bull. et P. 147. 1 Pons 351.

And upon the same principle a promise made by a father to pay for the past nursing of his natural child is good tho' the act is passed. 2 East 535.

And a consid<sup>n</sup> passed will support a contract, if the consideration accrued at the request of the promisee; for the subsequent promise couples itself with the previous request, by legal relation; & thus operates as if it had been made at the time the request was made: As if, you having bailed my servant at my request, I afterwards promise to pay you a sum of money for having done it. the promise is good. 2 Vent. 263. 3 Salk 96. Hob 105. Cro. Jac. 8. Cro. El. 309. 1 Font. 336. Cro. Eli. 22. 282. sup. & so.

It has been determined, that tho' a man stranger to a meritorious act done by another will not support an action ~~procured~~ on a contract founded upon it, in his own favour, i. e. meritorious act by one will not support as a consideration, a promise made to another, because the promisee does nothing advantageous to the promisee or disadvantageous to himself, in and he does nothing at all, is a man stranger to the consideration. Thus if a man con-

consideration that B will release him of a trespass, promise  
 is to pay C \$100. It is said & has been so resolved in  
 a number of cases that C cannot maintain an  
 action on this promise. Cro. J. 687. 2 Roll. 441. 597.  
 1 Vent. 6. 8 T. Rep. 330. Chit. Bids. 220. 1 Bos. 343. 353.

This rule however  
 has been relaxed in modern times. It seems now to be con-  
 fined to deeds or instruments inter partes. Thus, if  
 A & B. then covenant that A shall pay to C \$100. It  
 comes within the rule & C cannot recover, the in-  
 strument is between A & B and the action must  
 be brought by B. 3 W. 137. 1 H. 235. 3 B. 4 P. 148. <sup>note</sup> Carr. 77.  
 Cro. Eliz. 729. 3 B. 4 P. 1012. Corp. 443. 3 D. M. 35. 6. 185.  
 5 Bos. 2680. 1 T. Rep. 659.

The reason why a third party  
 cannot maintain an action in his own name on a  
 covenant in a deed to which he is not a party is  
 because of the solemnity of the instrument.

But in case  
 of penal contracts, it seems now settled by the authori-  
 ties that the third person for whom benefit the  
 promise is made may support the action. 3 B. 4 P. 148  
 note. 1 H. 1012. Carr. 210. 8 Mod. 117. 1 John. 140.

Notwithstanding the numerous cases that have been decided  
 we find that all of these have been decided upon authority  
 rather than principle, or in other words we find little rea-  
 soning on the subject.

Now I should say that the prin-  
 ciple on which the party can recover in case of the



and agreement is, that he is considered as adopting & ratifying the contract by his subsequent assent, precisely as if an unauthorized agent should purchase goods & the purchase were afterwards ratified by the principal.

But in the case of a specialty this is impossible. In the case supposed? It imports the breach of a covenant between A & B. & C cannot by a subsequent assent or by any act, from the solemnity of the instrument make himself a party.

And when a writ is brought upon a bond promise, the promise should be laid as having been made to himself the Plaintiff & proof of a promise to another for his benefit will support a declaration in that form. 1 B & P. 101.

Notwithstanding the contrariety of opinions which has prevailed in relation to the distinction which has been noticed, it is universally agreed that a consideration moving to one person from another will support a promise in favour of a third person nearly related to the former. Thus a promise to A, in consideration of an act done by him, to pay a sum of money to his daughter is good so that the daughter could recover on it. And it seems also agreed that a promise of that sort for the benefit of a stranger would not support an act in his name. This is an arbitrary distinction in a case where the law makes no difference which cannot be supported on principle. Indeed it appears now that no such w-

lation is necessary the action may be supported without it. 1 Vent. 318. 332. 2 Lev. 210. Ray. 302. 1 Pow. 353  
These cases give the rule as it once was. but the authorities above cited will show it not to be so now.

When a promise is made in consideration of the forbearance of a suit or action, two inquiries are necessary to its sufficiency. 1<sup>st</sup> The forbearance must be good that is perpetual, or never to sue, or for a certain fixed period, as a year. &c. 2<sup>d</sup> It must be from an action in which the promisor or the party claimed to be liable, is actually chargeable or there must be at least some colour of liability for clearly if the action is completely groundless a forbearance would be no consideration, Cro. Elg. 206. Esp. Dig. 95. 1 Pow. 353.4.

Since in the first place a promise to pay a debt in consideration of a creditor's forbearing to sue, no time being affixed, & it not being supposed to be perpetual is not good, the consid. not being sufft.

But if the forbearance be for a year or any fixed time or for a reasonable time in terms, the promise is good the consid. being sufft. & the court will judge as to the reasonableness of the time. Cro. Elg. 19. 455. Hutt. 108  
Esp. Dig. 95. 1 Pow. 353.4

Now the reason of this diversity is this. When the time is not perpetual nor limited the promisor is at liberty to sue at any moment after the promise is made, the consid. is a matter of no consequence & is frivolous. But it is otherwise when the forbearance is



hospital, for a fixed period or for a reasonable time.

In the second place, the forbearance must be in a case in which the promisor or the person claimed to be liable is actually, or at least in which there is a colour of liability.

Thus where a promise was to pay a certain debt in a certain time, and from this promise one, who was dead, if the creditor would forbear to sue him for a certain time, it was held not binding, for there was no consid. at all, the forbearance was of no advantage to promisor or disadvantage to promisor or creditor, the mother being under no moral obligation to pay the debt of her deceased son.

The case is similar to this you promise me something in consideration that I forbear to sue you for something done me by a third person. There is no colour of liability. *Hand 73. 3 Salk 96. 1 Pow. 354. 5.*

On a similar principle if one is arrested on a void process & a promise to pay money is made in consideration of his discharge, the promise is not binding, the arrest being unlawful there was no right to keep in custody & it was only a discharge from false imprisonment, a duty of the person arresting to perform immediately, & when an arrest is made on a writ issued by a select man or an overseer of the poor. *Esq. Big. 44. Hand. 73.*

But a promise in consideration of for

Insurance is good if there is a colourable liability of the party about to be sued. For whether the liability be actual or not, the party has a chance of recovering and by the forbearance he suspends or abandons that which the law deems valuable.

Thus an infant had purchased extravagant cloths or what appeared to be extravagant. & his Ex<sup>r</sup> promised to pay the debt in consideration of forbearance to sue her. The promise was held good for the promise might be profitable for it is not known what the court of equity would have turned in upon in the particular case & this probability the law considers valuable. Lat. 142. Dyce 272. 1 Pow. 356.

It is said by Mr. Powell that when the consideration of a promise is the forbearance of a suit against the promisor himself, the cause of action is not examinable, the liability cannot be inquired into. because the promisee acknowledges the liability. 1 Pow. 357.

But this rule states it cannot hold when it appears in the dect<sup>n</sup> that the suit forbore was altogether groundless, as even a promise is stated to have been made on consid<sup>n</sup> that it will not sue B for a trespass committed by C. the dect<sup>n</sup> would be insufficient.

I should think that in any case the inquiry might be made whether the suit were altogether groundless or not. The rule appears to me nothing more than a rule of evidence, so that the consid<sup>n</sup> be considered as prima facie sufficient.



and the ones thrown upon the Dep<sup>n</sup> it certainly does not prevent him from showing that the action for breach was grounded. I therefore doubt the correctness of Mr. Pomeroy's position in such general terms at least. —

Contracts when distinguished with reference to the forms of their considerations may be divided into three kinds.

1<sup>st</sup> When that which is stipulated on one side is in consideration of the performance of that which is stipulated on the other, the considerations are termed mutual. As when A agrees to pay B for doing certain acts as provided for above then here the performance is a condition precedent to B's right to the pay. Under the terms of the contract are that A is to pay in consideration of B's performance. A performance must be achieved in a suit brought to recover pay. 1 Kent. 177. 214. 3 Galt. 95. Holt. 106. 7 Co. 10. 1 Kent. Bl. 274. 275. 1 et. Rep. 240. note.

Suppose that if a suit is brought to recover pay the party must own performance or what is equivalent to it, as tender, making to perform but was prevented by the other party, or that the other party was absent when his promise was made as to the performance for any of these will be equivalent to performance 7 T. Rep. 155. 1 et. 638. 645. Sta. 1256. Long. 259. 2d Ray. 686. 1 East. 203. 208. 619. 2 et. R. 240.

2<sup>d</sup> The second class of contracts are distinguished by reference to the different forms of their considerations

is composed of those in which the performance on both sides is to be concurrent.

Then one party cannot compel performance or recover for the non performance unless he has done his part. As if a person were made to deliver a horse of a kind at a given time & place for such a price. The other party will perform without the other, neither is bound to trust the other. Neither can recover without performance or that which is equivalent to it. 1 Sam. 320. 1 East. 203. 619. 629. 2 et Rep. 240c. 7 T. Rep. 125. 4 ib. 761. 8 ib. 366. 1 Ann. Pl. 363.

And then the agreement is that one shall do an act, for the doing of which the other is to pay. the performance is a condition precedent to the obligation of payment. this follows from the rule already laid down.

But if according to the terms of the contract, pay<sup>mt</sup> is to be made on a day which is to arrive or may arrive before the time of performance, the doing is not considered as a condition precedent, and after day of pay<sup>mt</sup> an action will lie, before the day of performance arrives.

Thus in consideration of your engagement to build me a house. I promise to pay you \$1000 in four weeks, you are bound to build the house, but whether built or not you may sue for the money at the expiration of the four weeks, whether the house is built or not so that it may happen that two suits are pending at the same time on the same contract. 1 Sam. 320. 246. 2 et Rep. 240. 1 Pow. 358. 6 T. Rep. 572. 7 ib. 130. 2 Ann. Pl. 363. 7 T. 10. 12th 171.



The rule is the same in the case last supposed, when the time of payment is fixed: whether any time is fixed for the performance or not. If the money is not paid the party to pay is liable whether there has been performance or not. 2 Ct. Rep. 233. 1 Sam. & 320.<sup>w</sup>

But if the day fixed for the payment is to arrive after the time appointed for doing the act, performance is a condition precedent and when a suit is brought for pay<sup>t</sup>, performance must be proved. This distinction is all founded obviously in intention, 3 Ark. 171. 3 Salt. 95. 1 Sam. & 320. b. 2 Ct. Rep. 240. b. notes. 12 Mod. 462. 2 L. Ray. 665. you may see a contrary doctrine. Dy. 76. 1 Roll. 114. 115.

3<sup>rd</sup> The third class are those in which any, what, are termed mutual i.e. independent. It is unfortunate that the technical word "mutual" should in this class be applied to promises when in the first it has been used with reference to consideration.

Promises are said to be mutual or independent when the undertaking or engagement is in consideration of the undertaking or engagement on the other side. This is diff<sup>t</sup> from a contract in which the consideration is mutual as when the promise is pay for performance which of course is a condition precedent and the promise execut.

But in this case performance is not a precedent condition and either party may sue the other without averring performance, so that cross action may be de-

proceeding between the same parties at one & the same time.

As if in consid<sup>n</sup> of your promise to build my house I promise to pay you \$1000. you may sue without averring performance, for my promise was in consid<sup>n</sup> of your promise & not of your performance. Again as I promise to deliver a load of wheat in consideration of B's promise to pay, the promise is not in consideration of the delivery but of B's promise to deliver, then I repeat sue may sue without averring performance.  
1 Vent 177. 214. Hob. 88. 1 Lev 293. 3 Bult. 187. Salk 24

This latter distinction however is not observed in Ch. & if Peff is obliged to resort to that court, he must aver performance on his side or undertake to perform & as his bill is demurrable. The ground of this difference should be well understood.

It is not on account of any difference of construction of such contract, in a court of Eq<sup>ty</sup> that the proceedings there are different, but because the interpretation of that court is entirely discretionary, and altho the court of Eq<sup>ty</sup> says the intention of the parties is precisely what a court of law declares it to be, yet they declare that the judgment rendered by a court of law in this case is unconscionable, and it will not compel one party to perform & leave him to get his remedy at Law. The court of Eq<sup>ty</sup> settles the whole matter at once to avoid a multiplicity of suits, which a court will always do if possible.  
1 Fent. 383. Finch 445. 2 Freeman 35. 7 Bro. Par. Ca. 184.



When the ag<sup>t</sup> is in this form which by the way is not very uncommon, I promise to pay you \$100 on such a day, you transferring stock to me. & you promise to have full stock to me on such a day - I promising to pay you \$100. - the nomination absolute being used.

The con.

struction of such engagements has occasioned much dispute, and I have seen a modern decision declaring such promises independent, but I take it not to be law. The only correct paraphrase of such a contract seems to be. I promise to pay on condition you transfer, to say in "your delivering" means provided you deliver or on condition you deliver. This appears to me to be the plainest & most obvious construction 2 Bl. Rep. 1312 in that case such promises are declared independent.

I take it however that they are dependant this is according to the weight of authority as well as to principle. So that one cannot sue without averring performance on his side. Talk 112. Holt 663. 1 Fort. 382. 12 Allox. 503. 2 St. Bl. 270. 4 T. Rep. 761. 8 ib. 372. to 375.

As to the construction of language are so indefinitely & continually various and the forms of contracts so numerous that the particular forms which I have explained may afford you no clue to discover the intention of the parties. In more gen<sup>l</sup> terms there would observe that the question whether promises are mutual or dependant is to be determined from the spirit of the ag<sup>t</sup> & the nature of the contract or

in other words the intention is to be inferred from the order in which the promises require performance. you can not then to infer, the dependance or independance of promises from the order in which the stipulations are laid down in the instrument but from the order in which the intention of the parties requires performance. Doug. 665. 1 T. Rep. 645. 7 it. 130. 6 it. 570. 668. 8 it. 373. 1 Camd. 320. annotations. 2 K. Rep. 240. 240a.

I would here observe that the Eng. courts have of late leaned much against construing promises in dependant, and they certainly now ought so to be construed unless the intention of the parties are manifest for equity & expediency are both against the enforcement on one side without performance on the other and thus leaving the leaving the party to the honour & responsibility of the other. 4 T. Rep. 761. 8 it. 371. Wills 496. 1 East. 519.

I would further observe that mutual promises must both be binding or neither will be so for it is one of the first principles of contracts that to make an ag<sup>y</sup>. binding it must be reciprocally so.

The contract must be of such a nature & in such terms as to bind both sides: i.e. it must import to bind both. <sup>or</sup> rule is often misapplied. It is not true that one party cannot be bound unless the other is. for there are many cases in which the one is bound the other is not. Thus of an adult & an infant contract, the adult is bound the infant not, not so if one contracts with a <sup>it is void</sup> ~~few~~ covert. The meaning of the rule is, that



the contract must in its terms import to bind both parties, otherwise there is no mutuality, no mutual consideration which the law requires. Salk 24. Hob. 88. 1 Pow. 360.

With regard to the sufficiency of consideration in general that the mere act of trusting property, with another in consideration of his undertaking to do something with it or to bestow some labour upon it is sufficient to bind him to his engagement, altho the undertaking is gratuitous.

Thus A delivers property to B, who engages gratuitously to deliver it to C. the delivery & acceptance binds B. So if a carpenter, as L<sup>d</sup> Holt lays it down, engages gratuitously to build a house, & entirely new materials for the purpose are delivered to him, he is bound. But when the contract remains entirely executory as if the materials had not been delivered, he could not be compelled to execute. L<sup>d</sup> Ray 909. 110. 919. 920. Cro. Jac. 667. 5 T. Rep. 143. Salk 26. 3 Salk 11.

The rule as just laid down is indispensable to the preservation of common honesty among men.

The preservation of domestic peace or the honour of a family has been holden in Ch<sup>y</sup> a suff<sup>t</sup> consideration to support an agreement. Thus when one had a natural son & other children entered into an ag<sup>ty</sup> with his other children to prevent disputes as to the estate, it was holden a suff<sup>t</sup> consideration, being to prevent future litigation and the consequent publicity of family dishonour. 1 C. 11th 3.

1 Dow. 362.

So also the compromise of a doubtful right, has been held to be a suff. consideration. This rule applies to ag<sup>ts</sup> the parties to which are confident that cannot be a loser, but consider it doubtful in whom the losses fall. 1 Attk 10. 1 Vern 4. 2 Vent 353. 2 Ry. 284.

It is not necessary in any agreement that the consideration be expressed in direct terms as a consideration. It is suff. if the consid. can be collected upon the face of the instrument or whole agreement. If the moving cause can be discovered & is such as the law deems suff. it will be good, whether mentioned in terms or not.

Thus in the famous ag<sup>t</sup> between L<sup>d</sup> Battinor & L<sup>d</sup> Penn. there was no consid. ~~was~~ expressed, yet it was obvious that the moving cause was the settlement of boundaries, which L<sup>d</sup> Hardwicke held to be suff. altho it was not formally expressed as the consideration. 1 Wyl. 450. 368. 41. Dow.

As to fraud in a contract by specialty does not in gen<sup>l</sup> vitiate the contract. The fraud in the execution of the instrument does, by entirely destroying the obligation.

The reason of the distinction is, that when the fraud is in the consid. merely, there is no want of assent, the obligor executes the instrument he intended to execute, and altho he might have been defrauded as to the subject of the contract still the solemnity of the instrument prevents his averring it.



he is estopped to use such defence by his own act.

Dis. when  
 a seller a bad horse states B's bond as for a good  
 one. B cannot defend himself against a suit on the  
 bond on the ground of fraud in the animal. he is  
 estopped by his own hand & seal. and this whether  
 he was deceived by actual fraud or misapprehen-  
 sion. B's only remedy in such a case would be action  
 on the case or some collateral action.

But when  
 the fraud is in the receipt itself, obligor may sue  
 it & defeat the action. the instrument is not the  
 one it imports to be. there was no assent. as where  
 it was wrongly read to obligor. he never assented to it  
 & could not set his seal to what he intended to.

Thus  
 when two bonds were prepared, the one double the amount  
 of the other when the obligor had examined & held  
 hand to execute one, another was slipped in its place  
 so that he signed & sealed the instrument which he  
 did not assent to. In such case the obligor is  
 allowed to sue the bond & to prove it by parol, as  
 much as if it had been obtained by duress or was  
 actually a forgery. 2 L. 364. 2 Bul. 594. 2 Co. 380  
 11 ab. 27. 2 Sw. 422.

But C. of. will relieve against an  
 instrument for fraud in the consideration, & that  
 altho the fraud be actual. 2 count of C. of. must  
 enforce a specialty in toto if at all. But a count  
 of C. of. can apportion its relief to the justice of the case.

Thus a seller of flour at \$10 per bushel  
 it was worth only \$10. by misrepresenting the state of mar-  
 ket. B gave his bond on which an action is brought. A  
 court of C. J. must either say D is not at all liable  
 or give judgment for the full amount. But Ch.  
 can decree the D to pay the value of the article and  
 then throw the cost on to the party party. 2 D. W. 203.  
 3 Atk. 290. 2 Dow. 145.

And the rule of law appears to  
 have been the same formerly, in relation to contracts  
 executed the without deed i.e. to simple contracts  
 actually executed on one side at least thus a  
 parcel sale of goods under a false representation as  
 to their value, the vendor can recover the whole  
 price. & the vendor must take his remedy over on  
 the case. this was formerly the rule. So that  
 fraud in the consideration was no defence, when  
 there was an express promise to pay the price. see  
 Parker Co. 238. 1 Campb. 39. 4 Esp. 95. 2 Swift 169.

But in the case of parcel contracts the rule has been  
 greatly relaxed by recent decisions. I mean the rule  
 of law. And as far as the latter authorities may  
 be considered as settling the law. The rule now is  
 that parcel contracts are not affected by the rule  
 relating to fraud in contract, or in other words  
 such fraud may be availed in a suit for pay. tho  
 the contract is executed on one side.

And the rule now is  
 that when there is a partial fraud, as in the rail



value of the article def<sup>d</sup> may show the pound to mitigate the damages. and if the pound were total i.e. if the consider were more rife app. of no sort of value the pound may be shown by way of defence to defeat the action. 1 Comp. 39. 193. 49. & Johns. 453.

There are a number of practical distinctions arising out of the subjects of pound in pound contracts for which I must refer you to "insp. from the case"

In Con. a total pound in the consideration of a specialty has been considered a good defence at law. & our courts have repeatedly decided. Root 58. 305.

Still it is agreed that if there is a partial pound in the consid<sup>r</sup> of a specialty, it being of some value, the relief must be in Eq<sup>y</sup>.

There is still a further distinction between in Con. viz. that although the pound in a specialty is total yet if the obligation is not in suit, or if when there are several all are not in suit, relief may be had in Eq<sup>y</sup>. because one party cannot compel the other to sue, and then obligations may be laid over his head while all his evidence of the pound is out of the way.

Of the interpretation or construction of  
Contracts

The object proposed in the interpretation of contracts is merely to ascertain the intention of the parties, and a contract however expressed cannot rightfully be carried by on a that intention. 1 Powell 370. 371.

c. Such contracts are to be carried to the full extent intended if the words can be so construed as to effect that intention. 1 Pow. 372.

In the construction of contracts, words are generally to be understood according to their ordinary, popular & most known signification, unless there is a decisive reason to the contrary. *Howe 109, Pap. 55. 2 et. Pap. 213 / Pow 373*

from, that if it agrees to buy of B. 20 bbls. of wine, he is not  
to have the bbls. for bbls is a common measure. But if  
the agreement were to buy a pipe or a fdt. of wine the cask  
would go with the wine. for this is the practice of dealers  
and what is the common understanding among them  
when such contracts are made. 2 Pow. 86. 1 Pow. 374.

When the word month is used in a contract, according to the C. L. gen. rule, it is understood to mean four weeks, or a lunar & not a calendar month.

But if the term "twelve month"  
is used it is construed to signify a year, that is twelve entire  
calendar months. Whereas if twelve months in the plural were used  
it would be construed to signify only, 1 Don. 375. b. Co 61. 2 B.C. 141.



Under a rubric of quantity are construed as they are understood at the place where spoken or used. as of the term Bushel which in some parts of Gt. Brittain signifies 32 quarts in others 36 & elsewhere in some 28. The reason of the rule is that the parties are to be construed as using their terms with reference to the common understanding of them at the place where used.

Still if money is payable by contract, its denomination is to be understood according to their import at the place of payment. as if a contract were made in London for the pay<sup>t</sup> of £1000 at Dublin. the construction would be, to pay £1000 Irish. So if such a contract were made in New York for a pay<sup>t</sup> in London the term pounds would be rendered sterling from the supposed intention of the parties. 2 P. W. 88. 690. 1 P. W. 376. 207.

And when the language of a contract is ambiguous the intention may often be inferred from the subject, effect & circumstances, or from all or any of these.

Thus as

to the subject. We have a strong case in the covenant of quiet enjoyment in a lease, or as it is generally expressed the covenant of warranty. This covenant guarantees a quiet possession against all lets, troubles, interruptions, disturbances & evictions by every one. Yet the construction is that the words do not extend to tortious entries or wrong doers, but only against the claims of all higher titles. The amount of the covenant is that the grantee or lessee shall have the right

to hold the right of possession against all claimants of right in title, it is a gift, much only, that the guarantee is made. So that if guarantee or release is effected by a test. feoffor or trustor is committed, the warrantor is not liable. Cro. Jac. 425. Cro. Eli. 212. Sta. 450. 2 R. 80 4 B. Rep. 619. 3 ib. 584. 8 Co 91. Dot. 32.

It also from necessity that a contract may rather take effect than fail an instrument may operate as if it were in form & structure an instrument of a different species.

Thus: it is a rule of law that one joint tenant cannot implead another, both being seized per my et per tout. But a deed made for that purpose will take effect as a release. So a covenant by a creditor not to sue his debtor will operate as a release. So that in these cases words which are strictly in the nature of covenants are construed as words of release. Bay. 117. 2 Saund. 96. Cro. Eli. 352. Call. 574. 3 ib. 298. 1 D. Rep. 446.

On the same principle an instrument in the form of a deed or common appearance may operate as a release or demise. Now no one can by deed grant a parcel of land to take effect in future, so that if such a grant should be made, it may be construed as a release, from the apparent intention that it was so to operate.

Again the intention may be ascertained from the effects of different constructions. Thus if construing a contract according to the ordinary meaning of language will render it ineffectual & frivolous



a different construction may be put upon it. So that words which are construed as words of limitation may be construed words of limitation. ut res magis valeat quam pereat. 3 Leon. 211. 2 Bl. 155. Civ. Ely. 205. 1st 11.

So if an annuity be granted to one for instructing a child or for other service to be done, the grant is conditional tho it is not so expressed, for a reference to the subject matter, that is, the consideration will show that unless the act is so construed the object will not be attained, and the party defrauded. 1st 11. 14.

And the circumstances attending the transaction may be considered & referred to, to explain a contract otherwise doubtful or construed against the intention of the parties. As when an annuity was given to B. pro concilio in person & imprudens, the act was construed to mean professional advice or counsel.

So if one holding property in his own right & as Ex<sup>r</sup> make a grant of all his goods, it shall be construed with reference to those which he holds in his individual capacity only. 3 All. d. 278. 1 Bos. 385. 1st. sec. 535. 6. 7. Civ. Ely. 705.

And, a case that occurs more frequently than any other, a release containing the recital of some particular claim, followed by general words of release, as "in full of all demands". Other terms is that the latter general words of release are to be <sup>construed as</sup> qualified and restrained by the former words of recital. 11 Nov. 74. 1st 11. 14. 2d 11. 14. 2d 11. 14.

Thus when

A had a judg<sup>t</sup> ag<sup>t</sup> B. for \$5000. and so left a leg<sup>y</sup> & L<sup>t</sup> to C. whom he paid it to & A. would look on receipt there "Recd. \$5 the legacy &c. & discharge him of all demands as the Ex<sup>t</sup> of B &c" This was held not to release the judg<sup>t</sup> debt.

So if a rec<sup>t</sup> were "recd. of S.S. \$5 in full of a note I bore ag<sup>t</sup> D" "S.S. & of all demands ag<sup>t</sup> him" the receipt is restricted to the \$5. the gen<sup>t</sup> words being considered as a consequence of the particular recital. 1 Eq. Ca. 170. 3 Mod. 277. Cro. Jac. 170. L<sup>d</sup> Ray. 235. 2 Bac. 290. 1 Pow. 391. 2.

But where the receipt of a particular sum is acknowledged, without more, that is, where there is no particular claim recited, these gen<sup>t</sup> words will have their full effect: thus "recd \$5 in full of all demands," for no other intention can be imputed from such language. Canth 119. 1 Show. 155 3 Mod. 277. (Contra. but not law. 2 Roll. 409)

But if after the application of the rules of construction already laid down, the intention still appears doubtful, the agreement is in gen<sup>t</sup> to be construed most strongly against the party bound & most favourably for the other party. For the words are used by the obligor who is presumed to take care of his own interest & he ought rather to suffer than gain as one party must lose. 4 Co. 76. Plow. 140. 161. 171. 289. 1 Inst. 197. a. 267. b.

This rule however is not universal for where there is an ambiguity in the condition of a penal bond, the words are to be construed most favourably for the obligor because, although the words are his, yet they are intended for his



benefit, by advising him from a penalty which the law more favours for regarding is with jealousy it will avoid it if possible. Dyer 17. 5 Co. 22. 23.

Then it is said if one is bound in a penal bond, conditioned <sup>that</sup> \$10 be paid at a feast when there are two such feasts in a year, the money is payable at the last. Whereas if the obligation had been by single bill, promissory note, or covenant, it would have been payable on the first. This difference of construction is the effect of the penalty. 1 Pow. 397. Dyer 17a.

Further if one is bound in a penal bond to make a sufficient & lawful estate by or according to the advice of A.D. who is a receiver or collector, if you please, If he does make an estate according to the advice of A.D. the bond is discharged whether the estate be sufficient or not, even if the conveyance is void. I am speaking you will observe of the construction at law for Eq<sup>l</sup>. I presume would compel a legal conveyance and not leave the party without a remedy, altho the construction in Eq<sup>l</sup> is the same as at law. 5 Co. 93. 6. Perk. 775. 1 Com. 399. 450

(King's case 118)

Another exception to the general rule is, when that rule if used would or might occasion a construction injurious to third persons. Thus if A makes a lease to B without limitation of time, it is construed to be for the life of B. But if tenant in tail make a lease for life general, it is construed to be for the life of the lessor because in the want of life, surviving, mine it would otherwise tend to the injury of the issue in tail.

who are entitled to the estate as soon as the tenant in tail dies. The lease must therefore terminate on lessor's death, at least the construction most favourable for lessee would be, for his own life. 1 Inst. 42. 1 Pow. 400

\*

When legal language is used in a contract it is regularly to be understood according to its legal acceptation, for there are many words used in law which are technical & have a signification different from the usual given them in common parlance. Thus the word "heirs" followed by the restrictive presumptive appurtenances of the word. 2 Roll. 253. 1 Pow. 402. Hob. 217.

Thus if an estate be limited to A for life & after his death to his heirs as long as he shall continue to pay a certain annual sum, the limitation extends to all A's heirs forever whether lineal or collateral, i.e. as long as the succession of heirs remains. Because the word "heir" is not a descriptive personae, but a noun collectivum, and is always to be so understood when technically used. It thus shows the quantity of interest taken, which is an instruction which cannot be given by any other word in a deed. 1 Pow. 402. 2 Roll. 253.

\* Subject to the rules laid down just previous to the two last paragraphs. Words are to be construed in the most comprehensive sense in which they are generally understood. Thus a covenant of warranty against the claims of all men means all persons. So if joint tenants make a bill of sale of all their goods, those held in severally pass as well as those held in joint tenancy. 1 Pow. 400.\*



Contracts are to be construed according to the  
genl. intent appearing on the whole contents, tho  
apposed to some particular words used in it.  
Dyer. 240. Cro. Eliz. 43. 615. 1 Pow. 203.

If the thing  
stipulated for is not done nor delivered at the time  
the contract requires, the value of the thing at  
the time appointed for performance is genl. the rule  
of damages. As if a contract to deliver a load of wheat  
on 1<sup>st</sup> July. at that time wheat was worth \$2. And it  
was in the contract in Sept. when it is worth \$1. he  
was entitled to it when worth \$2. & that was est. contract  
so that \$2 shall be the rule of damages. Dyer 812

There is now ex-  
ception to this rule when the value of the article has risen  
after the time appointed for delivery has passed, in such  
case the value at the time of trial or recovery is to be  
the rule of damages. For the Plff might have kept  
it until that time and Def<sup>t</sup> has prevented his chance  
of realizing the rise in market. As if in the case  
above, the value had been \$1. in July. & \$2 in Sept.  
The rule of damages would be \$2.

"Suppose in some  
"case it was proved that in Aug. it was worth \$3?  
I find no case of the kind in the books says Mr. G. G. G.  
But I presume on principle that \$3 would be the rule  
of damages. (You will observe that all this rule  
can be made to favour the Plff or party who suffers  
by the non performance. 1 Vern 217. 1 Eq. Ca. 221. Stra.  
406. 2 Burr. 1010. 2 Vern. 394. 2 East. 211. 1 Pow. 409.

If several instruments are made at the same time, between the same parties, respecting the same subject matter, they are all to be considered as part of the same contract & in construction to be taken together as parts of one instrument, precisely like the different parts of one united contract.

Thus A executes an absolute unconditional deed to B. B then makes a defeasance declaring that if certain facts are made by such specified time then the deed of A to be void. These instruments constitute a mortgage.

So, the rule would be the same in respect to a penal bond. A gives B a penal bond. B then executes a defeasance importing that on A's paying a certain sum of money the single bill shall be void. These writings are only distinct parts of the same contract, constituting a penal bond. 1 Pow. 210. 2 Vern. 518.

Of the modes by which a contract may be discharged, annulled & waived.

I would premise that until the terms of the proposed contract are accepted on both sides, the act is not consummated & of course either party may retract the offer he has made. 3 T. Rep. 653. 1 Pow. 334.

But an offer on one side being made and accepted by the other, becomes a contract, i.e. an offer & acceptance constitute a contract so that either party may bind the other by performing his part or by



underlying performance according to the terms of the  
ag. 2 Bl. 447. Hob. 41. 2 Pow. 63. 2 B. & C. 241.

And if on such an offer being made and acceptance by  
the other, earnest is paid by way of binding the bar-  
gain, or a future time is fixed for the performance, the  
contract is complete & the property bound, that is the  
right of it is transferred, in all cases as a present right  
to a present or future possession is acquired at the  
time of contract made. Arg. 42. 2 Bl. 447. 1 Hen. Bl.  
363. 7 T. Rep. 64.

Thus A & B agree that A shall have B's horse  
& pay \$100 for him. The contract to be performed on Monday  
next. or if there was no time fixed but part pay & made,  
the party from that moment acquires right to demand  
& take poss<sup>n</sup> of the horse on Monday & the other to de-  
mand the money on Monday.

But if on an offer  
being made on one side & accepted on the other, with-  
out more is done & the parties separate, there is no  
complete contract. i. e. if there is no pay. & no ear-  
nest, no future time appointed, no obliging & the parties  
separate, there is no contract, or rather it is waived  
at the time of making. The common understand-  
ing being, that if no future time is fixed the contract  
is to be performed instantly, and as the parties  
have now separated, no one time can be said  
to be the time of performance, or the person  
to whom. 2 Bl. 447. Pow. 352. 300. 1 Hen. Bl. 363  
2 ib. 316. 1 Pow. 231.

So also if A agrees to sell certain goods to B, provided he shall choose to purchase them at such a price and gives him time to consider, that is, B is to give notice whether he takes them or not within such time, as barely four hours. If B gives notice after the parties had separated & before the time is expired, still A is not bound, because before the parties separated there was no contract. B was not bound, so there was no consideration for A's contract. The law will not allow one party to be bound alone. In this case therefore A is not bound by B's acceptance unless by a new contract, so that he may take advantage of this locus poenitentiae. 3 T. Rep. 653 (contra 1 Bow. 261. not law)

Before a right of action has accrued on a simple contract, the parties may rescind it by parol, by expressing their mutual dissent or by mutually agreeing to rescind it, for the being no breach the mutual assent which is the essence of the contract is withdrawn before either party can make a claim upon the other. As in the case of the horse to be delivered on Monday, as before stated, the parties may dissolve the contract before that day coming by parol. Com Dig. Pl. 2 G. 13 Civ. Ch. 283. 2 Lev. 144. 2 Bac. 265

But after a right of action has accrued by breach on either side, it cannot be discharged by parol, nor in any way but by release by deed unless indeed a new agreement is made as an accord & satisfaction. Thus if I tender the horse at the time & place & you do not pay, if I agree to discharge the contract



by, and merely. I am not bound. This is not a mu-  
tual revocation of agent, but a discharge of a  
right of action consummated, which requires more  
solemnity of law than mere parole. Cr. Ch. 384  
1 Mod. 259. 2 ib. 44 12 ib. 538. 1 Pou. 212. 13. 16. Bats  
Park 234.

It is however a rule of law much that an acceptance  
of a bill of exchange may be discharged by parole  
& that even after the bill has become payable. On  
principle there is no distinction in the cases. This is  
a positive rule of the Ex. M. & is governed by the  
principles which govern other contracts in general.  
Doerg. 235. 247. Chit. Bills. 83. & Esp. D. 47.

an agreement may in  
Eg. be rescinded merely by a long omission on both  
sides to assent or claim under it. Thus an agreement  
between L. & Lord to grant to inclose certain com-  
mons, lay dormant for 25 years when a bill was put  
for performance. From such length of silence to claim  
under the contract, it was fairly presumed by the  
court to have been abandoned. And the in-  
terposition of that court being discretionary, it will  
not enforce such stale contracts when both parties  
wished never to be called on. 1 Pou. 413. 9 Mod. 2. 3  
2 Eg. Ca. 227. 3 Bro. Par. ca. 116. 2 P. M. 821. 4th 201.

And a contract con-  
summated & sealed may be rescinded & that by  
one of the parties only, if there is a provision to that  
effect in the original contract. Thus at Col. a carriage  
& horses of B. they were delivered & paid for. It

having been agreed that A might return them within a year if he did not like them. He did return them and B refused to accept them. The court held the contract was at an end in consequence of that provision and that A could maintain an action in debt for money paid & received for the pay<sup>t</sup> he had made. 1 Cow 415. 1 St. Rep. 135. 7 ib. 201. Com. 818. Long. 23. 2 East. 145. 1 Ct. Rep. 351. 3 Esp. 82.

There is a rule in this respect laid down by Mr. Powell the propriety of which I cannot now discover. Thus, if A agrees to purchase property of B at such a price as S. S. shall name, with reference to future valuation, the parties themselves cannot in the mean time rescind it, because says he, they have appointed a third person to perfect it. Mr. Powell seems to go upon the ground that S. S. is interested in the contract but he is not the truth is, he is referred to merely as an instrument, as if such reference were to the market price, this therefore cannot be law. 1 Pow. 415. 1b.

But a contract may be released or made after as before a right of action has accrued when & this release may be either express or tacit.

An express release is regularly an acquittance by deed. A tacit release is effected by destroying or by burning or cancelling the instrument, for this annihilates the contract & may be deemed releasing it.

So also if he who is to be benefitted by the performance



ance of the contract, prevents the performance, the other party is released or discharged. Thus if A contracts to buy B \$1000 if B will build such a house, if A prevents B from building the house, in any manner B is discharged. 8 Co. 91. 2. Co. Lit. 206. Cro. Eliz. 374. 1 Pow. 265. 416.

And in the case that A prevents the party who was to perform, but is prevented by the other party is in the same condition as if the agreement had been fulfilled by him, in other words he may maintain his action to recover the stipulated price. 1 Inst. 216 b. 1 Pow. 410. 420.

Again, a contract may be annulled by one of a higher nature for the same thing. The new contract according to legal language merges the old one, thus a simple contract debt may be merged in a bond, and if proof is covered it merges the security of bond or any other instrument. For when some indubitable gives a bond, the intention is not to give a two fold debt, or to furnish a two fold remedy, but merely to substitute a higher for a lower security, that creditor may have a higher not an additional remedy, it is to make the evidence of the debt more complete 6 Co. 45. 3 Bac. 134 Bull. et. 155. 3 Inst. 251. 1 Pow. 423. 1 Barr.

But such is not the effect if the higher remedy or contract is entered into by a stranger. Thus if being indebted to B, C gives his bond to B, for the same sum the simple contract is not merged. B may still sue on it as he may

see B. on the bond. For it was intended to give B an additional remedy or security to get what was due. 236. b. 1 Pow. 422.

And a contract of a given degree is not extinguished or merged by another of the same degree. Thus when indebted by simple contract. I give a promissory note to pay or when indebted by note give another for same sum. Cred may sue on either. 1 Barr. 9. Cro. J. 579. Cro Ely. 517. Chitty B. 62.

It is to be observed however, that when the second contract is intended as a substitute for the other, altho it does not strictly merge the former, still if the facts can be proved I may plead the latter by way of accord & satisfaction, or when one promissory note is given for another, or for same sum & intended as a substitute, and in that way make a good defence, altho I cannot plead it in bar as a merger. 2 T. Rep. 26. 3 East. 251. 5 id. 232 5 Co. 117. Stra. 426.

And further when a contract of a lower nature is inserted in a higher one merely by way of recital or to corroborate, or enlarge the remedy, the former is not merged for it is not intended by this process to be turned <sup>it</sup> into a specialty. Thus suppose one to receive goods of a bailiff & receive to act & then to acknowledge the receipt of such goods, or money in a deed or bond, this would not prevent the party from pursuing his remedy by action on the previous simple contract & the deed may then be given in evidence. So if a bailiff makes such an acknowledgment he may be sued in



detinue. for the specialty is intended only as additional security.

And yet speaking when a contract of a higher nature merges one of a lower, the orig<sup>l</sup> contract and the simple contract are kept out of view, the specialty precluding all inquiry concerning them. But in the case of recital just observed upon, the simple contract is recognised as an existing debt. 1 Bac. 19. 1 Roll. 118. 2 Bull. 256. Cro. Eliz. 644. 1 Dow. 218. 223. 225

A contract by deed is not to be annulled or discharged by any new contract or ag<sup>t</sup>. except by deed i.e. it cannot be discharged by any, bond agreement or acquittance, agreeable to the maxim "obligatio quolibet obligatur." i.e. every contract must be dissolved by something of equal solemnity. 6 Co. 44. 2 Will. 86. 336. 1 Camm. 291. note 1. Cro. Jac. 254. 20. 602. Cro. Eliz.

This is a mere catch in words, for altho it does not discharge the bond, it will discharge all the money due upon it, so that the effect is only to transfer a new rule of pleading.

And it is laid down in all our books, that an accord & satisfaction nor even a payment is no discharge of a bond. This sounds very strange and is founded in a very verbal distinction. for altho the obligor when sued cannot plead pay<sup>t</sup> directly yet it is to that a plea of pay<sup>t</sup> of all the monies, debt, duty &c. due on the bond would be good, for obligor cannot compel the recit<sup>r</sup> of an acquittance when he pays the bond. 4 Plow. 192. Cro. Jac. 254. 7 Mod. 144.

So it is said again that an accord & satisfaction cannot be pleaded in discharge of a covenant, but (seem) a plea of accord & satisf<sup>ac</sup>.

in full of all damages accruing & the same is good. it an.  
1 Co 43.4.

When the right & duty created by a contract unite in  
the same person the contract is necessarily & of course  
discharged at law. As when the debtor is made Ex<sup>r</sup>  
or Ad<sup>r</sup> for in such case the only person who can sue  
is the Ex<sup>r</sup> or Ad<sup>r</sup> and a receipt in this way the form  
of law prevents. altho there has been diff<sup>r</sup> decisions in  
in St<sup>r</sup> 8 Co. 130. Salk 300. 2 Pow. 250. 254. 5. 4 Mod.  
62. 10 id. 515. 3 Bac. 699. 1 Wms 226

The rule in general is the same  
when the debtor & creditor are intumary, so that one can  
not sue the other & in any event what was recovered  
would be the business as regularly. 1 Pow. 438. 9. 444  
Hob. 218. Cray. 157. 6. 576. 4 Co 33. 5 Tr. 331.

In these cases however relief may be had in Eq<sup>t</sup>. so as to  
do justice to third persons who have claims. Thus if  
there was a deficiency of assets a creditor might com-  
pel Ex<sup>r</sup> or Ad<sup>r</sup> to account for his own debt.

A contract  
may be discharged also by act of the legislature which  
interposes between the making of the contract and  
the performance, as if it were to perform a voyage  
which a subsequent act declares illegal as by an un-  
bargo declaration of war &c. the contract is discharge.  
Salk 198. 8 Mod. 51. 2 O. W. 218.

So also a contract  
may be discharged by the act of God or inevitable  
accident. as when a person covenanted to have all  
the timber trees standing and they were destroyed



by tempest. If A was not held accountable for merely  
meant & this must have been the understanding on  
both sides, that A would not destroy the timber.  
It could not be supposed that he intended to insure  
ag<sup>t</sup>. inevitable accident, as in the case before  
mention of a contract for a voyage to Winzaw.  
10 Mod. 268. 160.98. Noy. 35.

So also if an article  
bailed as a horse to B. and the horse dies, or if goods  
are destroyed after bailment without fault of bailee  
he is not liable, i. e. he is discharged from his obliga-  
tion to return them. Palmer. 548. 1 Pow. 447. 8.

If again one is bound in a bond conditioned to convey  
land on a before a day certain, & he dies before the day  
arrives, the penalty is saved, that is, he is discharged,  
quod the penalty the Ch<sup>ll</sup>. will compel his heir to  
make a conveyance. 1 Eq. Ca. 18. - see also Pow. 448. How. 288.

The act of a third per-  
son cannot regularly discharge or vary the terms  
of any contract, tho' it may relate to him. Thus when A  
gave a bond conditioned that B should appear on 8 days  
notice in such action, and that he would satisfy  
the judg<sup>t</sup> ag<sup>t</sup> him. B did appear but on 6 days  
notice, judg<sup>t</sup> was in d. & ag<sup>t</sup> him & he did not  
satisfy it. & A was not bound. 1 Pow. 457. Jones 441.

If however the  
contract is to take effect be annulled or discharged or  
varied by the terms of it, by his act, his act will of course  
operate as it was agreed. & as if the agreement were that

I should have the goods at such a price as I should  
 hint. the parties are bound by the price he fixes,  
 & if he refuses to fix any the contract is discharged.  
 / Pow. 415. & 16.









563.

## Prerogative Writ.

Mandamus: is a writ of that class that is called prerogative which are used to redress injuries which cannot be otherwise remedied.

### Mandamus ipius

From B. R. in Eng. In bon<sup>o</sup> from the S. Court & doubtless may be issued from the courts of highest jurisdiction in all the States. The object is specific relief & so far resembles a bill in Ch. but it does not issue when a bill in Ch. lies. 3 B. & C. 110. Galt 429 1 Vern. 175.

This writ is granted in those cases only which relate to government or the public. & when without it there would be a failure of justice. 5 B. & C. 527. 4 M. & S. 281.

The object is to enforce obedience to the acts of the legislature & to prevent disorder from the failure of justice & a defect of police there being no other specific remedy. Doug. 506. 3 M. & S. 1267. It is to admit or restore a person to some franchise or right which concerns the public & of which he is deprived. 11 Co. 93. Esp. D. 661. 5 B. & C. 529.

It issues then regularly ag<sup>t</sup> some public off<sup>r</sup> body corporate or inferior court. commanding some off<sup>r</sup> or corporate duty. 3 B. & C. 528. 4 M. & S. 52. & as to an individual to compel performance in individual capacity.

This is a writ demandable of common right & the court is bound to grant it, if proper evidence be adduced, without imposing terms. 3 B. & C. 528.



It lies to compel an off<sup>r</sup> to hold elections, to call meetings &c when by law it is their duty & they omit it - to restore a person to every description of corporate offices. *Sto.* 1003. 1151. 1 *Lev* 91. *Exp.* 622. *Ray.* 69.

It will lie in favour of off<sup>r</sup> who have been unlawfully displaced to restore them. *1 Vent.* 77. *Burr.* 1799. *Pop.* 176. By this writ persons in authority may be compelled to do their duty, as inferior courts, justices &c. 3 *Hib.* 371. 3 *Bac.* 535. *Sto.* 113. 552. *Sal.* 229.

It may issue to b<sup>ks</sup> &c requiring them to deliver up books, documents &c. to their successors when they are dismissed from office. 1 *Wils.* 305. *Exp.* 663. 7. 2 *Sto.* 879.

It is not fixed by any definite rule what offices concern the public & to which persons may claim to be restored or admitted. This must be collected by example. - It has been much asserted of late. 5 *Bac.* 530. *Salk.* 175. 11 *Co.* 94. *Ray.* 211. 2 *Buls.* 122. 1 *Vent.* 143. 153. *May.* 78. *Comp.* 371. 7.

This writ will lie in favour of an alld<sup>g</sup> ag<sup>t</sup> an inferior court to restore him to practice when he has been "thrown over the bar" 1 *Hib.* 549. 1 *Vent.* 11. 1 *Lev.* 75.

The offices in these cases must be of an established permanent nature - But it is not to be understood that the office must be a freehold one. it is suff<sup>t</sup> that it is an annual one & has fees annexed to it. 1 *Wils.* 11. 1 *T. Rep.* 331. 4. *Leib.* 125. 1 *ib.* 146. *Exp.* 666.

When the office is merely of a private nature, the writ

will not be granted. But it may issue in favour of an officer of a Turnpike co. for those companies are incorporated. Esp. 666. 1 Sid. 40. 1 Vent. 143. 3 Bac. 528. n. In Eng. officer of steward of 6<sup>th</sup> Baron. Library companies &c are without the rule.

But it will never issue to enforce an act by a corporation before it is settled whether they have a right to act. 1 Wils. 266. Esp. 665.

It will never be granted to compel the doing of an act, when the doing that act is discretionary. 2 Stra. 881. 2 Bl. Rep. 708. Esp. 668.

If several persons are deprived of rights of the same kind each one must have a writ for himself. They can't join in an application. Bull. et. P. 200.

This writ is not usually granted in the first instance, tho it sometimes is. the common mode is by rule, to show cause why a mandamus should not issue. 5 Bac. 538. 3 Bl. 111. Bull. et. P. 199. 200. If the probable cause is a matter of notoriety it may issue in the first instance.

It is never granted but on affidavit of the party applying - It is never granted unless upon disavowal of him against whom the writ issues - it goes not to prevent a default. Bull et. P. 199. Esp. 670.

It is not directed to the Sheriff or other officer of the law, but to the person whom duty it is to do the act. Selk 699. 701. 1 Stra. 55.

If upon a rule to show cause, sufficient cause



is not shown, it will be granted. 3 Bl. 111. It is usually if  
 send in the attestation, directing the person to do the act  
 or show cause why he has not done it. If Def<sup>r</sup> returns  
 a suff<sup>r</sup> reason, he is excused from being tried.

By. b. L. a  
 return could not be traversed but now by Stat of return  
 & assize one in most states, it may be. 1 Vent. 111. Sal. 32.  
 Doug. 134. 3 Bac. 543. LaRoz. 481.

The return being by b. L.  
 conclusion the party was directed to his action on the case  
 if the return were false. 3 Bl. 111. Esp. 6484.

However by  
 the stat q. c. sum. ch. 10<sup>th</sup> may traverse the return & not be  
 put to his action. If the party took his action on the case  
 at b. L. the question whether the return were true  
 or false is tried by jury. & judgment goes for damages &  
 a peremptory mandamus is issued. provided the same  
 court tried the action. (Sal. 430 3 Bac. 544.) And if a false  
 return be made by writ, the action for it may be brought  
 against all or either of them. 3 Bac. 544. Caute. 171. 2.  
 Esp. 685. Doug. 144.

And the action lies as well for a sup.  
 purposio writ. as for a false return. - If the writ is directed  
 to several down is opposed to the false return his counsel  
 he is acquitted. LaRoz. 564. Caute. 172.

If the reason  
 of the return is insuff<sup>r</sup> on the face of it, a peremptory  
 mandamus will issue of course. Sal. 301. Esp. 685. 3 Bl. 111.  
 And if after a peremptory writ to return the writ, motion  
 is made, an attachment issues for contempt. If the writ

can aff. w<sup>o</sup> the attachment goes up all of them altho  
some may wish to return the writ. It is not however  
to be understood that all will be furnished, 2 Sal 479  
34, 3 Bl 111. 3 Bne. 451. Stra. 808.

The contempt is punished  
by fine or imprisonment or both sometimes corporally  
and if the party is guilty of any disrespect in his return  
he may be punished by attachment for contempt. 4 Bl. 287  
Cro. Car. 146. 3 Bl. 111.

In bar. every town is a corpor<sup>n</sup> & may  
be sued. a county is not & so cannot be sued. If then  
the co. is indebted to Sd. he gets a mandamus to the co-  
treasurer to pay it. if he returns no money. a manda-  
mus issues to the justices to levy a tax.

Suppose a town  
clerk will not receive Sd. deed. he could receive damages  
at law, but that will not insure his title. Ch<sup>t</sup>. will  
not interfere because there is no contract between the  
parties. By b. 2. Sd. then makes an ex parte complaint  
accompanied with an affidavit. A summons is first  
issued gen<sup>l</sup>. to the clerk to show cause, why mandamus  
should not issue. if he makes no suff<sup>t</sup> return. a man-  
damus then issues in the alternative. if the return is  
still insuff<sup>t</sup> the next writ is peremptory. If the clerk  
returns suff<sup>t</sup> reasons. altho false as that no deed has  
been delivered to him, it is conclusive at b. 2. & it will  
not be tried on affidavits, can. is then both a peremp-  
tory writ issues with out<sup>n</sup> if determined for complainant.  
This process is shortened by stat. so that now the return may  
be traversed & tried immediately. -



Application for a mandamus may be made to the court if in session or to one of the Justices in vacation. It is always accompanied with an affidavit in writing. 1 Salk. 699. 1 Stra. 56. 1 Vent. 111. 3 Wils. 245. — 11 Co. 99. Carth. 171. Stra. 808. 1 Salk. 230.

As to the authority of a court to punish for contempt. if it be to punish for disobedience to a preceptory writ, the party may be confined until he does it if it be for life. If the commitment be for contempt in abusing or disturbing the court, the imprisonment ends with the session of the court. & I have known justices prolong their session from day to day that the offender might be punished.

## Prohibition

This writ is usually issued from B. R. to prohibit inferior courts from trying or deciding cases out of their jurisdiction - or from deviating from the established mode of proceeding. This writ may in some instances issue from the court of Chanc. 6 B. 10th Exch<sup>g</sup> 3 Bl. 112. 2 H. Bl. 100. 12 Co. 6. 58. Hob. 15. 1 H. Bl. 476. 2 L<sup>d</sup> R. 1408. It is directed to the inferior courts and to the party prosecuting in it. 3 Bl. 112. Hard<sup>g</sup> 475. Barnes. & Toly 428.

The mode of obtaining it is by a rule to show cause why the writ sh<sup>d</sup> not issue, in many instances by an affidavit of the fact upon which it is claimed - But when the fact is manifest upon the record, there is no need of an affidavit. 1 P. W. 476. Hob. 79. Salk. 549. L<sup>d</sup> Ray. 1211.

Whether it must be granted as a matter of right is disputed the gen<sup>l</sup> opinion is, that it is discretionary with the C<sup>t</sup>. Hob. 67. Ray. 3. L. 92. Salk. 33. L<sup>d</sup> Ray. 220.

For the purpose of obtaining the writ, the party aggrieved in the C<sup>t</sup>. below sets forth a suggestion or record of the matter, which is the ground of issuing the writ. (3 Bl. 113) And if the matter suggested, is as to its sufficiency, doubtful or questions of diff<sup>y</sup>, the party applying is to declare in prohibition. 1 L<sup>d</sup>. 125. 2 V. B. c. 248. Co. E. 786. 4 Mod. 151. 2. 3 Bl. 113.

It lies in some cases where the inf<sup>r</sup> court has jurisdiction of the cause. Ex. where a st. has passed regulating the proceedings in such cause. & the inf<sup>r</sup> court deviates from the regulations.



This can be the want of jurisdiction and said to be the only  
 one in which a prohib<sup>n</sup> can issue. 2 N. H. 100.

After the case  
 suggests or suff<sup>r</sup> a writ of <sup>in</sup>junction after the rule be seen if  
 the cause is insuff<sup>t</sup>. The writ commands the cl<sup>r</sup> not to  
 hold plea the party not to prosecute.

To declare in  
 prohib<sup>n</sup> is to prosecute an act<sup>n</sup> by filing a decl<sup>n</sup> ag<sup>t</sup> the  
 opposite party upon a fiction not traversable, that  
 the latter had proceeded, in disobedience to a prohib<sup>n</sup>  
 before granted.

This decl<sup>n</sup> pursues the suggestion, the act<sup>n</sup>  
 is then proceeded with & the sufficiency of the cause is  
 then pleaded in this action (3 Bl. 113. 4. 4 Bac. 248. n) &  
 if found suff<sup>t</sup> judg<sup>t</sup> with nominal damages is for  
 the Plff in the act<sup>n</sup>, & if insuff<sup>t</sup> judg<sup>t</sup> is for Def<sup>t</sup>  
 in the action, & a writ of consultation is issued,  
 i. e. for the court below to proceed with the trial.  
 3 Bl. 114

And if after a prohib<sup>n</sup> has been  
 issued, the cl<sup>r</sup> think that it is contrary to law, a writ  
 of consultation is awarded? 4 Com. D. 517. 3 Bl. 114  
 this sometimes upon its own motion.

The party prohibited  
 may take a decl<sup>n</sup> pursuing the suggestion & traverse  
 the fact on which prohib<sup>n</sup> was founded & if issue is  
 found for him a consultation issues. 3 Bl. 114

Should  
 if this writ is punished as a contempt, with fine &  
 imprisonment - at the discretion of the court. 2 F. 20  
 4 Bl. 287 4 Bac. 262.

And if the party prohibited commences a new suit he is punishable as for contempt. Mod. 599. 1 Leon. 411

On the attachment for contempt Plff is over damages & costs & the contempt is further punishable by fine for the public offence. 4 Wac. 262. 1 Vent 348. Cow. Com. 559. 3 Lev. 360.

In bar. this writ is issued by the C. J. during vacation the Ch. Justice or any two Justices have the power of issuing it. This State adopts the Eng. law on this subject. Hat. 6. 327. 8.



Quodam Querela

This writ is used to obtain relief, when  
 a creditor has issued an execution against his debtor for  
 some debt or reason he ought not to pay it. 1 Roll. 307. 10.  
 2 Lev. 273.

This is the case when judgment itself ought not to have been  
 obtained, or when the debtor can show something which will dis-  
 charge him from liability on that judgment as payment &c.

In such case the officer who has the execution is not warranted in judg-  
 ing of the validity of the release &c in discharge of the execution. &  
 that such quer. is the only remedy. An execution is appropria-  
 ble to the true right action was not. Root. 36.

If a debtor imprisoned  
 on an execution is liberated on consent of the creditor the debtor is discharged  
 of his liability - and if he is afterwards pressed with the execution  
 he is entitled to such quer.

If the debtor has had no day in court, or  
 if judgment has been rendered in confinement or otherwise against  
 a minor without his guardian an execution quer. will be granted.

In law, if pressing an action on note, the debtor pays the debt and  
 takes a discharge & the plaintiff afterwards takes judgment by default  
 & execution. The debtor may have an execution quer. The court considering  
 him as not having a day in court, since he was justifiably in  
 trusting the plaintiff under such circumstances. The plaintiff in such  
 quer. may also recover what he has paid on the execution.

This writ

lies also when judgment has been obtained by fraud &c & execution issued.  
 An execution quer. when determined for the plaintiff not

only vacates the us<sup>n</sup> but also gives damages for the injury sustained by Plff. by reason of the us<sup>n</sup>. de. 2 Sw 274.

It contains a synopsis of the <sup>re</sup> until a final judgment upon it.

On taking out this writ, a bond must always be given to answer all damages sustained in consequence of it by opposite party.

This writ discharges the Def<sup>t</sup> in ex<sup>t</sup> from prison & the bond serves as a security substituted for the prisoners person. And in this case the ar. d. op. is a final sur-  
purgas & the bond is the only remedy of the P<sup>ff</sup> in the  
execution.

In Eng. this writ is granted by C. J. of C. B. in C. L.  
by the same judge, this is from custom which is not ac-  
counted for. I never suppose that it may be granted  
by a judge of any court if a state did not interfere

This relief is not granted of course but at the discretion of the judge who examines the facts stated in the petition & decides on the justice of the petitioners claim to relief

If a man is by sleep or by a grove sleep arrested by the other party, prevented from attending court & thus judge goes against him, he is entitled to an arrest quod on the ground of his now having had a day in court.

If two parties are ob-  
lained there is no other out. If two, + several obligors, only one ex<sup>t</sup> can be  
collected. If therefore one ex<sup>n</sup> has been satisfied this part may  
be placed in lieu of the debt, the rest of the cost, remains  
unpaid. And if after pay<sup>g</sup> of one ex<sup>n</sup> the other is, before an exp<sup>t</sup> for



any thing more than the costs, unless it may be had by and given  
If one who has taken some recovery judgment & take out an ex parte  
debtor & an ex parte afterwards appears & shows the will of the  
creditor may have aid. given. ex parte the debtor if he prefers him  
with the ex parte. Law. 19, 20, 30. 2 Dec. 411.

If an absconding debtor  
has before he absconded taken an ex parte a debtor of his. After that  
ex parte into the hands of an officer such debtor tho' factored in a  
suit against an absconding debtor is obliged to pay the ex parte in the  
hands of the officer. In so doing he is indemnified against the  
foreign writ, instead of being driven to and given. against the  
officer. We must the money in this case remain in the hands  
of the officer? Root 545.

Diff in foreign attachment does not by  
calling on garnisher to disclose whether he has any property of  
the principal, preclude himself from adducing other evi-  
dence of the fact. Root 138.

If a bond given by two joint obligors  
is pleaded by one who has left the state. & the remaining obligor  
is sued & has property against him, on which judgment is taken & an  
ex parte taken out against him who has the bond. can and given.  
lies if the act of debt or property is taken within the state. If  
brought out of the state a new trial may be had.

When one of two joint obligors has left the state. service  
on the one remaining is good against both.

The Eng. of an  
affidavit by the party applying for relief against an ex parte  
a rule of court is granted for the other party to appear & deny on  
oath the facts stated by the applicant. If the party served  
with this rule appears & denies the facts on oath. an award

quere. may be had to by the facts. If he does not thus deny  
them, the writ will be set aside.

The writ discharged the body  
goods &c. & stops all proceedings in it<sup>n</sup> the whole remedy  
after that being on the bond.

If Def<sup>n</sup> in ex<sup>n</sup> recovers  
in the suit a trial of and quere. He recovers damages  
& a thorough discharge.

If it goes ag<sup>t</sup> him the remedy  
is on the bond & no defence is good to this suit except  
payt. After court give judg<sup>t</sup> directly. 6 co. Jac. 29 b  
Ch<sup>r</sup> 443. Mr. Jones 378



## Habeas Corpus.

By this writ a person deprived of his liberty may be brought before some sup<sup>r</sup> Ct for some special purpose. 3 Bl. 129. 131. either on his own application to be released from confinement or the application of some other person having a right to require his appearance.

1<sup>st</sup> The writ of Hab. corp. ad respond. is issued to remove a prisoner from an inf<sup>r</sup> Ct. to charge him with some new action in a court above. 3 Bl. 129. 2 Mod 198.

2<sup>d</sup> Hab. corp. ad satisfaciendum is issued to remove a person to sup<sup>r</sup> Ct to be charged with breach of ass<sup>nt</sup> 3 Bl. 129.

3<sup>d</sup> Hab. corp. ad faciendum et recipiendum, is issued to remove a cause to be tried in a sup<sup>r</sup> Ct. It is demandable of common right 3 Bl. 130. 1 Mod 235. 2 ib. 198. 3 ib. 30. 2 Mod 306. 3 Bac. 15. Salk 352. This is frequently called. hab. corp. cum causa. It instantly suspends all proceedings in the Ct below & any subseq<sup>t</sup> proceedings are void as ex parte non judicis. the body is removed by this writ & the proceeding by certiorari. the case then proceeds as de novo. It is however never granted when it would abate a prior rightful suit. as from sole Def<sup>t</sup> in orig<sup>l</sup> suit manner. Salk 8. 3 Bac. 15.

There is no use for the above mentioned three kinds in Com<sup>l</sup> Ct.

4<sup>th</sup> The writ of Hab. corp. ad testificandum issues when a party wishes to procure a prisoner as a witness. 3 Bac 3. 3 Hbl. 51. 57. As this writ operates as a temporary,

release of the prisoner. it was formerly holden that it wrought  
an escape of a pris<sup>r</sup> in re<sup>m</sup>. Camb. 17. 48. 1 Sid. 13. 3 Co 44  
2 Wac. 238. But this illiberal opinion was overruled  
& it is fully settled that if <sup>the</sup> pris<sup>r</sup> surrenders any lib-  
erty, as to transact business, see his friends, or ride a cir-  
cuitary route for an argument or other cause, he is liable  
for an escape otherwise not. 1 Mod. 116. 6 Co Car. 14. Hob. 202.  
2 Wac. 238. This writ is now granted to bring-  
up prisoners of war. Doug. 453. 3 Bac. 2. 3.

5<sup>th</sup> The principal writ of habe. corp is the writ ad subj-  
circandum (1 Burr. 631. 3 Bl. 131) This issues to a person  
holding another in custody, that he bring him up, to do,  
submit to, & receive whatever the court shall award con-  
cerning him.

By this writ a person may be discharged  
from any species of illegal confinement. 1 Root. 92. 3. 8 T.  
Rep. 374. 3 Bl. 131. 1 Burr. 314. A person impris-  
oned by either house of Parlt<sup>s</sup> for contempt cannot be  
discharged by this process.

The writ issues at C. L from Ch.  
of B. R. & Ch. by a fiction of privilege from Com<sup>rs</sup>  
Pl. & Excheq<sup>r</sup>. But in case of any crime these two  
last courts could only take bail for his appearance  
or removal thence 3 Burr. 3. 2 Wac. 198. 2 Hale 144. Burr. 856.  
Law. R. 543. 3 Bl. 131. 2. 2 Vent. 243. 2 Mod. 498.

But now  
by St. 16. Car. 1 the full benefit of this writ may be had with-  
out fiction from either of these courts. The prevailing  
opinion is that it cannot issue from Ch. in vacation, but



it is not settled, 3 Bl. 132. 2 Mod. 198. 3 Bac. 3. 2 Hale. P. C. 147

This writ is directed to the gaoler or other person ordering him to produce the body. He shew the cause of his detainer & the court as the case requires may either discharge, admit to bail or remand to prison. Sal 350. 2 Ray. 581. 618. 3 Bl. 136. 1 Vent. 330 Lb.

The Stat. 22 Car. 2. regulates this writ & its regulations are adapted in this country. indeed it is merely declaratory of C. L. By this st. the writ can be issued by either of the 12 Judges in vacation & by either of the judges of our S. courts. if issued in term time it is signed by the clk. Geo. 1. 543. 3 Bl. 131.

By what authority a person may be committed, he may be relieved by this writ (3 Bl. 135. b.). But it never issues in favour of persons committed on conviction or ex<sup>te</sup> or for treason felony &c. Sta. 142. 10 Mod. 249. 3 Bac. 9.

And it lies as well to relieve persons unlawfully confined by individuals as those confined by a public officer. When the person confined is under a legal disability, it may be served out by his or her friends: as in case of female covert or infants unlawfully confined by their husbands, grand<sup>mo</sup> parents &c. 3 Bac. 15. 3 Hal. 536. 2 Lw. 128. 5 Mod. 21. Sta. 91. Barr. 606. 31.

That is by any relation or friend & even if he be not specially authorized by the person confined, such friend &c. is entitled to the writ in his own name but in behalf of the person.

A girl who was 20 years of age was

told to go when she chose upon the hearing. 1 Burr. 606.  
 A wife fled from her husband's barbarity. he broke her  
 carp. the court refused to deliver her to him. & told  
 her to go when she pleased & threatened the husband with  
 an attachment if he molested her. 1 Bac. 631. 3 Bl. 134  
 1 Vent. 330. 346. Salk 350. 2 Ray. 518. 586.

When the return is suff<sup>t</sup> the court will not allow it to be  
 traversed, but leave the party to his remedy. but if the return  
 were to prove false it should be void & rein the off<sup>r</sup>. 2 Inst. 55  
 Vaughan. Rep. 156.

The return may be suff<sup>t</sup> byt not decisive, as  
 when there was cause of imprisonment. but that it has  
 ceased to exist, as when good suff<sup>t</sup> bail is offered. This  
 must be alleged without traversing the return. If true the  
 pris<sup>n</sup> may be discharged, for it is now settled that in  
 bailable cases bail must be accepted if suff<sup>t</sup> altho'  
 offered after imprisonment. In this case the Ct<sup>h</sup>  
 does not send the pris<sup>n</sup> back to the off<sup>r</sup> to be bailed, but  
 bails him on the spot.

If one is confined on a sentence  
 after conviction, yet the writ lies, if it is claimed made  
 to appear that the court which issued judg<sup>t</sup> had  
 no jurisdiction of the matter.

Disobedience to this writ  
 is contempt & is punished as such by fine, imprisonment  
 & other corporal punishment. 3 Bac. 10. Bunt. 31.

Fitz. 103. 58. 12 Mod. 666. Burr. 231. 482. 3 Lev. 128









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## Law of Partnerships.

what amounts to a partnership vid. Doug. 386. 371. 4 Esp. 182. 3 D. M. 402. 1 N. Bl. 37 2 S. 144. Mats. 17. 2 N. Bl. 247. 2 Bl. R. 27. 8. He who agrees to share in the profits of business makes himself liable to his partners for the losses. *Wise & Mats. 27. 8.*

Partners are proprietors of the partnership property per my definition. *Leach. 171. 1 V. 364. 7. 1 H. Bl. 39 enq. Mats. 17. 20. 1.* For the diff<sup>er</sup> between partnership & sole contract vid. 1 H. Bl. 37.

The property of a dissolved partnership vests in his Ex<sup>or</sup> but the surviving partner has the right of suing to collect such of the joint property as is not in possession. *Mats. 49. Esp. 118. Salk 444.* The Ex<sup>or</sup> & Ex<sup>or</sup> of the other cannot join - *see antea* & 1 Pop. 245. He has this right however under a liability to act with Ex<sup>or</sup> of the dissolved partner. *Mats. 49. 2 Kay. 340.* A surviving partner may join in an action a demand accruing to him as survivor & a demand accruing to him in his individual capacity *vide* 3<sup>o</sup> Skin 433. 5. Judge P. thinks a surviving partner cannot do this now. tho it was formerly tho. he could. 3 T. R. 433. 5. 1 How. 183. 8. 190.

If the surviving partner is unable to respond to the demands of the firm, the Ex<sup>or</sup> of dissolved partner is liable. *V. 259.* And in this case it has been customary to file a bill in Chancery against the Ex<sup>or</sup>. *Hibb. 105.* tho J. Ross thinks there is no necessity of so doing tho. *1 P. M. 682.* This opinion has been formally & retroactively expressed to the law by the Sup<sup>re</sup> 16<sup>th</sup> in *Wain. J. 60.*

It has been said that the surviving partner



has the absolute control of the joint property. 1 Vy. 242. 250.  
1 Bos. 425. Wals. 49, 124. This idea I River considers very  
in accurate, for that would amount to complete ownership. Wals.  
140. 146. 294. 5. 1 Vy. 242. Leach. 249. The true rule seems to  
be as settled in our courts. that the prop<sup>r</sup>. rests in the Ex<sup>t</sup> but  
by reason of the inconvenience of joining the survivor & Ex<sup>t</sup> in  
one action (never in this case can one wd sue in his own right  
dth other in that of his testator - the one wd be liable to costs  
& costs the other not) the former is noted with the right of  
collecting so much of the joint prop<sup>r</sup>. as is in action. Salt  
444. Com. 474.

If A & B transact business even in separate  
houses under an ag<sup>t</sup> to share in each others profits: each is  
liable so far as relates to third persons for the others losses.  
tho there is an express stipulation between them to the con-  
trary. Doug. 371. 2. 1 H. Bl. 227. Leach. 814. Wals. 27. 73.

If one  
of two partners obtains an act of insolvency exempting his person  
from arrest, his estate dth body & estate of the other are still  
liable for the Co. debts. Kirk. 53.

Partners are joint tenants not only  
of the right stock but of all the property acquired whatever changes  
may take place in the course of trade. Pe. Cha. 285. Wals. 17.  
116. 32. 1 Vy. 242. Leach. 249. 814. 1 Vy. 252.

Partnership is founded  
on contract - It is not sufficient to constitute a partnership that  
two or more persons hold anything in common as legates donors or  
purchasers of the same thing. Wals. 19. 100. 32. 58. 84. Co. Lit. 11. 2.  
150. 5. Roll 114.

Partnership is a voluntary contract between

two or more for joining together their money goods or labour upon an agreement that the gain or loss shall be divided proportionably. Wats. 17. Doug. 356. 3 P.W. 402. 1 A. Bl. 37. Doug. 371. Gain stops to be shared according to proportions in wh. the respective partners contribute. Wats. 21.

If one advances money to a trader, he may make himself a secret partner - the criterion is this - If the profit or premium to be recd. for the money advanced is certain & defined it is a loan - if casual, indefinite & depending on the accidents of trade he is deemed a partner. Wats. 27. 8. 31. 44. 5. 2 Bl. A. 998. 47.

Ex<sup>l</sup>. partnership ag<sup>t</sup> specifically dec<sup>d</sup> in 6 Bl. Wats. 323. 3 Atk 353. 4. 2 Ky. 33

Part<sup>rs</sup> ship concerns are regulated by the L. ell. Wats. 48. 58. 74. 89. 303. 2 Vent. 196. Styl. 143. 2 How. 352. Palm. 397. Popph. 161. 2 Roll. 248.

If no express ag<sup>t</sup> is made to the contrary the profits stop are to be shared equally - seems if there is an ag<sup>t</sup> to the contrary. And if they make some ag<sup>t</sup> as to the profits only their share in the loss shall be the same as one stipulated with respect to the profits & converso. Wats. 34.

A person may make himself liable as a partner without having entered into a contract of co-partnership, by permitting another to use his name & credit, as such Wats 40. 519. 175 Doug. 630. 600 793.

To suspect persons as partners on the ground of their sharing profit stop they must be jointly interested, not only in the purchase but in the future sale of the property. If two c. k. B & C agree that A shall purchase a cargo in his own name & that



If one of two partners buys goods for both & the other dies, the former may be charged in Insolv. aft<sup>r</sup> death without any mention of the partnership. Wats. 62. 3. Comb. 383. 2 T.R. 479.

When there are sev<sup>l</sup>. part owners of a ship, the major part of them (in int<sup>l</sup>. I suppose, may let the ship or send her on a voyage ag<sup>t</sup> the will be not without the consent of the others. L<sup>d</sup> Ray. 235. Wats. 75. But the major part must give security in the b<sup>t</sup>. of Admir<sup>l</sup>. for her safe return. vid infra. Wats. 76. 7. L<sup>d</sup> Ray. 235.

Shipowners

are tenants in common. Wats. 75. 9. If the ship be converted by a stranger, trover will lie for any part or share as an 8<sup>th</sup> L<sup>c</sup>. Mol. 309. Bul. 34. 7 T.R. 279. by the Maritime Law. 5 Mac. 261. Skin 640. This is contrary to the gen<sup>l</sup>. rule of C.L. 5 Mac. 260. 3 Leon. 113

But a part owner of a ship, cannot maintain trover for his part ag<sup>t</sup> his partner Ray. 18. 1 Lw. 29. Wats. 75. 6. 1 East 363. 5. 1 Kibb 38. 3 Leon. 228. Litt. 323. Co. L. 199<sup>b</sup> 200<sup>a</sup> Salk. 290. 392. Acc<sup>o</sup>, if the latter destroy the ship. Wats. 80 Bul. 34. "Trover"

Partowners of a ship may surrender the part ownership when they please by the law of Eng<sup>d</sup>. by selling their respective shares Wats. 76. But by the L<sup>d</sup>. Marine this cannot be done without consent of all, till an voyage is made. Mol. 310.

If one of sev<sup>l</sup>. part owners objects to an voyage proposed by the others, he may arrest the ship & compel the others to give security for her safe return by process out of Admir<sup>l</sup>. Wats. 77. L<sup>d</sup> Ray. 323. Steer. 896 1 Wils. 101. Ray. 78. 1 Kibb 38. 1 Lw. 29. Litt. 323. Co. L. 200. (sup<sup>a</sup>) on such security a suit may be maintained in the Ad<sup>l</sup>. Wats. 78.

Lafrey. 235. 6 Mod. 162. 1 B. & D. 415. Barth. 26. Coult. 109. Holt  
647. con. 6 Mod. 12. 26. 79. In the last case the part  
owners who disagree to the voyage are not entitled to an act  
of the profits, sent. Mats 79. Skin. 230. 2 6 L. 6a. 36.

What can  
after partners in trade may alone dispose of the whole partnership  
property. Mats. 80. 145. Corp. 445. If one becomes a bankrupt, every  
bona fide sale so by the other not knowing of the act of bankruptcy  
is good Corp. 445. Mats. 140. 144.

If one partner instead of advancing  
money gives notes to the other for his share & then becomes a bank-  
rupt, his assignees are entitled to one half of the stock & profits the  
the other party has voluntarily discharged the note. Corp. 469.

The  
master of a ship, is not as such, a partner. Mats. 80. 1. He is chosen by  
a majority of the owners, in Int. Nov. 11. Mo. 918. Mod. 310. 4 Inst. 706

What the master by virtue of his poss<sup>n</sup> may maintain trespass ag<sup>t</sup>  
a stranger for taking away his ship Salk. 10. Mats. 81.

Partnership being  
founded on contract, (Mats. 100). it cannot be formed without the consent  
of all the parties. - each of whom must approve of & accept all the others  
for his partner. Mats. 100.

How on the death of one partner  
his Ex<sup>r</sup> is not as such a partner with the survivors, (unless it is  
provided in the partnership contract that he shall be. Mats. 292. 5  
2 Vy. 33.) Is he not part. in loan<sup>r</sup> with them? 1 East. 263. yes.

Of  
the assignees of one partner, he being a bankrupt. Mats. 294. 4 Burr.  
2177. but they are tenants in com<sup>n</sup> with the other. 1 East. 263. 8

When the respective partners contribute equally in money, labour &c



the profits are to be divided equally. Wats. 101. 5. Secs when they contribute unequally - as to the diff. means of dividing the profits when they contribute unequally see Wats. 102. 21.

Partners are bound to use the same care with respect to the property of the partnership; that they are in their own private concerns. And if any loss happens by an embezzlement of this degree of care in either of the partners this is accountable for it. Wats. 113. 4, 5

Each partner may regularly sign for & in the name of the co (but he sh<sup>d</sup>. do it "for himself & partner" or in the name of the firm. Ch. 30, 56. Lalk. 126. LaRoz. 178. 1484.) but this privilege may by particular ag<sup>mt</sup> be confined to one or more of them. Pra. 16. Wats. 114. Ch. 27. 8. 200. Lalk. 125. 7 N.R. 207. Ch. 72. 112. Holt. 297. Esp. Rep. 135. The power of attorney is admissible on this point vid. Ch. 28. 9. Burr. 1216. 1221. 181. R. 295. when the law is silent.

If a partner exceeds his authority in any transaction wh. occasions a loss he must bear it. But in genl. the powers of each partner are discretionary in carrying on the trade Wats. 115.

After a dissolution, as before, the partner who is in arrears has a specific lien on the co. stock for the balance due to him from the others on the partnership acct. & if this he cannot be deprived by the private acts of the other partners Wats. 128. 9. 25. 6. 1 Vy. 372. 67. 242. LaRoz. 871. Lalk. 392.

The creditors of any one partner cannot affect co. stock any further than the indebted partner himself could. 1 Vy. 242. 3 Bro. Ch. 257. Wats. 125. 9. 215. 6.

The Bankrupt Law

partnership dissolves the partnership. 2 Burr. 2174. Corp. 445. Wats.  
143.5.

The dissolution of partnership does not sever the joint debt  
after partnership in partnership effects. Other rule holds whether the  
dissol<sup>n</sup> is by ag<sup>y</sup> or otherwise — In cas. of dissol<sup>n</sup> one partner  
has no other right ag<sup>y</sup> the other than to an acct. & to the balance  
due him. Corp. 449. Wats. 140. 145.6.

When a dissol<sup>n</sup> happens  
by the death or bankruptcy of one, his Ex<sup>r</sup> or assignees hold with  
the survivor, as the testator or Bkpt. did — in the same Int<sup>y</sup>  
in contract as the partner (I subject to the same rights in  
the survivor to wh. it was before subject. Wats. 141.6. 292.5.  
Corp. 449. Litt. 321. 1 Vy. 202. But the Ex<sup>r</sup> is not partner  
with the survivor unless the partnership contract pro-  
vides that he shall be —

Never also after dissol<sup>n</sup> one partner  
cannot maintain t<sup>o</sup> ag<sup>y</sup> the other for a moiety of the  
co. effects. Wats. 147.8. & can. the assignees or representatives  
of the former. Litt. 323. Co. L. 200. Salk 290. Corp. 450.

If one partner  
takes more than his proportion of the stock — the other may come  
upon his separate estate pro tanto 1 Atk. 225. 16 Vin. 242. pl. 3  
Cocks Bkpt. L. 612. Wals. 148. 211.

As to the allowance made to Bkpt. partners under St. 5 Geo. 2. c. 16.  
152.3.

If money due to the partnership is rec<sup>d</sup> after the death  
of one of the partners by a third person — the surviving partner  
may have Indeb. ass<sup>n</sup> for it in his own right & act as sur-  
vivor: 2 D. R. 476. Esp. 110. Wats. 153.

Several partners cannot main-  
tain



tain an action on an illegal contract made by one of them, tho it was made without the knowledge of the other, 3 T.R. 454. Mats. 160.

If two partners incur losses in an illegal transaction one of them pays the losses with the consent & at the request of the other the former may recover a moiety of the latter in Insult. apt. 3 T.R. 418. Burr. 2069. 2 St. Bl. 379. 1 Hy. 156 (Ch. L. 109.) Mats. 166. 80.

If two partners are concerned in an illegal transaction wh. incurs a penalty the King may prosecute either of them alone & recover of him the whole penalty tho the other can be bit on penalty need. Burr. 223. 98. Comb. 616. Bath 171. Mats. 181. 2.

So it is R. if one of the partners is concerned in such a transaction with the partnership, Mats. 181. 2. Burr. 223. Mats. 183. 5. Comb. 616. 20. But this rule seems to suppose the other partner privy to the transaction.

A contract wh. is immoral or in violation of the law will not create a partnership tho it be in the form of a partnership contract Mats. 195. 201. E.g. A borrower of money who is about to carry on a trade gives a bond for the money & covenants at the same time that the lender shall also have a portion of the profits of the trade; the borrower & lender in this case are not partners, the contract is usurious & void. 793. 4 T. Rep. 353.

Permanence of a suit 20 y<sup>rs</sup> between J<sup>r</sup> Murch & others dealing having ceased for that length of time) is akin to a bill for an act in Eq. Mats. 211. 12. 2 Vin 276. Gell. Eq. R. 224.

as to how far the act of simulation affects the act of J<sup>r</sup> Murch.

vid. Mats. 211. 12. books. B. L. 648. 289 b. a. g. 10. M. 325. 2 ib. 128.  
1 c. 228. Bl. R. 653. 4 T. R. 189.

Two partners ag<sup>d</sup> to borrow money  
one of them gave his sole bond & the other witnessed it & both  
became bankrupts. The obligor was allowed in abat<sup>t</sup> to prove his  
debt ag<sup>d</sup> the co. 1 c. 225 (ca. in 229 Mats.)

If two partners agree to pay a sum of money out  
"after their own private cash". they must be sued jointly in the ag<sup>t</sup>.  
1 H. Bl. 236. Mats. 229. &c.

In act<sup>s</sup> by or ag<sup>t</sup> partners, they must all  
be made parties (Mats. 322. 3. Esp. 117. 8) If one sue alone on contracts  
advantage may be taken of it in evidence under the gen<sup>l</sup>.  
issue Sta. 820. Bul. 152 If in Part it is pleaded abt in abat<sup>t</sup>.  
only. Sta. 820. Sal. 4. 90. Esp. 411. 2 T. R. 282.

If one partner is sued  
alone on a parol contract. 12 Bl. R. 947. Mats. 240/ it is pleadable  
in abat<sup>t</sup> only. Mats. 234. 5. 40. 5 Burr. 2611. 1 Vent 34. Cro E. 494.  
Mats 244. 2 Bl. R. 950. 1 Lio. 420. If on a written joint contract  
3 Bac. 698. Leo. L. 282. 5 Co. 119. 2 Bl. R. 697. Cro. J. 152. 1 Vent. 34.  
9 Co. 110. Popph. 161. 5 Burr. 2614 (Taylor v. D. S. L. 2.) Both above dis-  
tinctions in Mats. 232. 3. 1 Burr. 10. 7 T. R. 243. 5 Burr 2611.

For both or partners may be sued alone 5 T. R. 651. Salts  
290. But after a severance one may sue alone on a cont<sup>t</sup>.  
orig<sup>l</sup>ly joint. Mats. 233. 4. Esp. 117. 18.

If two partners are sued jointly  
one appears & ff may recover judg<sup>t</sup> for whole debt ag<sup>d</sup> the latter. If  
default ag<sup>d</sup> the former. 2 c. 510. Mats. 240. 6.

If one of two part-  
ners will not join in an action. he is summoned: however



If he will not then prove the other has paid? 2nd question  
 volume, 2 ed. 510. 11. Mat. 246.7.

The discharge of a bankrupt  
 the stat. 4<sup>th</sup> 25<sup>th</sup> does not discharge the partner, the latter  
 remains liable.

creditors as to whom partners are bound jointly  
 jointly may (on a commission of bankruptcy ag<sup>d</sup> those) make his  
 election to come upon the joint or separate estate, but not ag<sup>d</sup>  
 both except for the deficiency. After the other creditors are p<sup>d</sup>.  
 Burr. 269. 1 ed. 107. Mat. 249.

If one partner bring an Eq<sup>ty</sup> or trustee  
 lends a trust fund to the trade with the knowledge of the other, it  
 becomes a debt in favour of assignee trust ag<sup>d</sup> the co. & in case of a  
 bankruptcy this debt may be proved ag<sup>d</sup> the joint estate - see  
 if it is done without the knowledge of the other partner. 3 Bro.  
 Ch. 265. book, B. L. 316. Mat. 250.1.

If one the dispo<sup>n</sup> of the part  
 partnership between A & B it is ag<sup>d</sup> that A pay all the debts & a  
 cred<sup>r</sup>. Knowing the ag<sup>d</sup> delays collection for a great length of time  
 he is still not deprived of his remedy ag<sup>d</sup> both even in Eq<sup>ty</sup>. See 403.  
 1<sup>st</sup> M. 689. 2 Eq. Ca. a. 167. 630. 2. Mat. 251.2.

And acts subsequent to  
 the time of delivering goods on a contract, may be proved as evidence  
 that they were delivered on a partnership acct. - but if there  
 was no partnership at the time of the contract & no subseq<sup>t</sup>  
 act by any person who in any after time becomes partner will  
 make him liable on that contract. 4 T. R. 720. Mat. 259.

A partnership is not liable for the debts, wh. one part<sup>r</sup> may incur in pur-  
 nishing himself with his part of the orig<sup>l</sup> stock. 4 T. R. 720. Mat. 259. 67. 8. 71. 2.

Partnership may be dissolved at any time by the consent of all parties. - but no one can dissolve it without the consent of the others within the time limited for its duration by the orig<sup>l</sup> contract. When no time is limited any one may dissolve it by withdrawing himself provided it is not done with any sinister view to the prejudice of the others, or at an unreasonable time, as after a particular business is begun &c. Wats. 273. 5.

Dissolution may take place in several ways as 1<sup>st</sup> By effluxion of time i.e. by lapse of the time for wh. the partnership was contracted. Wats. 275.

2<sup>o</sup> By a dividend of all the bus<sup>ness</sup> profit<sup>s</sup> after a complete liquidation of all the bus<sup>ness</sup> acc<sup>ts</sup> (86).

3<sup>o</sup> Partnership contracts for a single dealing is dissolved by the dealings being completed or closed. Wats. 276.

4<sup>th</sup> By Arbitration if the partners by their submission authorize the arbitrators to dissolve it, it 2 Atk. 570

5<sup>th</sup> By Bankruptcy - if either of the partners Wats. 282. 3. Cowp 468. 71. a partnership debt will support a separate commission ag<sup>t</sup> that partner, by whom the act of bankruptcy is committed. Wats. 283. 5. 1 Vern 153. 1 Atk 134. See also B. L. 20. 1. 2.

6<sup>th</sup> By the death of one Wats. 294.

7<sup>th</sup> By forfeiture or an attainder of treason or felony. Wats. 219. civilly dead - prop<sup>erty</sup> confiscated (as to this see 6<sup>th</sup>)

The death of one dissolves the partnership even as between the survivors however numerous they are, unless the partnership ag<sup>ts</sup> provide to the contrary. Wats. 294. But a temporary insanity in one



arrangement of mind, than being a prospect of new<sup>ly</sup> does not dissolve the partnership. 2 Ves. 35. Mats. 295.8.

Partnership by farmers taking lease, are not in Eng<sup>d</sup> completely dissolved by the death of one partner. Mats. 298.9

Tho' partners are joint tenants yet for advancement & continuance of commerce, there is no survivorship between them. The Est. of dead becomes trust in bene<sup>volence</sup> with survivor. 1 East 363. i.e. no survivorship in interest - for the remedies by wh. their int<sup>est</sup> is to be secured & their rights enforced, do survive. Mats. 29. 140.6. 299.4. 124. 294.5. 302.3. Salk. 444. Show. 189. Esp. 118. La Ray 340. 281. 1160.3<sup>d</sup>. 1 Roll. 86 Co. L. 182<sup>a</sup>. 1 Vern. 217.

The rule that there is no survivorship between partners is founded on the L. ell. Mats. 299. Co. L. 182<sup>a</sup>.

If on the death of one partner the other continues the trade with partnership stock & surplus; the latter must acc<sup>ord</sup> with the Rep<sup>resentations</sup> of the former for the profits made by continuing it. 1 P. M. 141. 10 Mod. 20. 2 Eq. Cas. at 55. 722. Mats 301.2.

Both partners being dead an a bill for an acct<sup>of</sup> of the partnership a receiver is appointed in Eng<sup>d</sup>. 3 Bos. & Ch. 272

If one of two partners signs a note in his own name only in his transaction, both are bound by it in Eng<sup>d</sup>. 2 Vern 277.92.

Can one partner bind all severally? 1 Root 119. If in an Eng<sup>d</sup> ag<sup>mt</sup> 2 one of two partners, partnership goods are taken & sold, the other partner is entitled to a share of the assets, proportioned to his share in the goods. Doug. 627. 50. Salk 292. 1 Show. 173

One partner may have indebt. ap<sup>t</sup>. ag<sup>t</sup>. the other for money  
p<sup>d</sup>. on a partnership debt, after the dissolution. 2 T.R. 278. 1 East.  
208. Butts v. Bartle's con. And if there are three partners the one but  
one who does not plead in abate<sup>n</sup> may recover the whole proportion  
of the two others from the one sued. 1 East. 20.

An obligation to pay to  
A, B & C partners all the sums which they shall pay to D. does  
not bind the obligor to pay what is advanced to D. by A & B after  
C's death. 3 East. 284.

If one partner is charged beyond his proportion  
Eq<sup>t</sup>. gives him a lien upon the partnership effects. 1 Vry. 367. 1 Eq. 6.  
ab. 8. 1 Vry. 374.

A contract with A B & C partners cannot be enforced  
by A & B alone tho they comply with it after C withdraws from  
the partnership. 7 T.R. 254. 3 Wils. 532. 1 T.R. 291.

When partners  
in trade become bankrupts the mode of settling the estate is to ap-  
ply the joint prop<sup>t</sup>. to the pay<sup>t</sup>. (See also B. L. 289. 5 Bro. Ch. 457.)  
of the co. debts & the private estate of the partners (in the first  
instance) to the pay<sup>t</sup>. of their respective debts. 5 Devere. 611. 8 T.  
Rep 152. Mats. 123. 4. 36. 7. 9. 150. 1. 2. 3. 215. 16. 18. 249. 2 Vinn. 293.  
2 Bro. Ch. 15. Cooks B. L. 312. 1 Bos. 527.

If there is a surplus of  
the private prop<sup>t</sup>. it is all liable (2 Bro Ch. 119) for the debts of  
the co. Mats. 150. 1. 2. 3. 2 T.R. 278.

If there is a surplus of p<sup>r</sup>o<sup>p</sup>.  
& a deficiency of private prop<sup>t</sup>. so much of the former as belongs  
to any one of the partners may be applied to the pay<sup>t</sup>. of his pri-  
vate debts: but not to the pay<sup>t</sup>. of the private debts of any of the  
other partners. 1 Vry. 242. 52. Mats. 125. 9. 18. Leach. 449.



One partner cannot recover by Insurb. a sum of money rec<sup>d</sup>. by the others on the partnership acct. unless there be balance struck. Esp. 96.7. Wats. 221. otherwise if the money rec<sup>d</sup>. be not partnership prop<sup>y</sup>. Wats. 153.

After the dissol<sup>n</sup> of a partnership the partner authorized to receive & pay the debts &c. cannot bind the others by giving a security in the name of the firm, sent. 1 H. Bl. 155. 2 id. 618. Wats. 278. nor can either of them bind the other by new contracts. Wats. 278. 1 Ch. 30. But in this ca. notice is necessary as to third persons. 1 Ch. 30.

One partner cannot bind his copartner by deed without a power for that purpose by deed. sent. 7 T.R. 207. 4 id. 213. 3 Bac. 408. Com 61.5 1 Ch. 28.

Before the partners become bankrupts the prop<sup>y</sup> of each both joint & private, is liable indiscriminately for every debt whether joint or private.

If one of two partners is indebted in his private capacity, no more than his part of the joint prop<sup>y</sup> can be sold & appropriated to the pay<sup>mt</sup> of his debts. If more than his part be taken as it sh<sup>d</sup> be it cannot be sold on the st<sup>th</sup>. Cowp. 449. 1 East 362.7. Wats. 121.3. 2 H. Bl. 84. Com 277. 626. 1 Mac. 460. Selw. 392. Comd. 217. Holt. 302. 623. Doug. 627. 50.

A sale of his part under an ass<sup>ts</sup> makes that person chosen trust in bond with the other partner. 1 Ky. 366. Cowp. 449. 2 Mod. 279. 1 Show. 173. 2 L. Ray. 871. Lalk 392. 4 Mac. 460. 3 P.W. 25. 12 Mod. 446.

If one of several partners contracts as for himself i.e. without disclosing the partnership, still if the contract is in fact made for the

partnership, proof of this fact. (tho' it was unknown at the time  
of the contract, to the third person with whom the contract was  
made) will render all the partners liable. 4 Burr 725. 7. 8. Corp.  
636. 814. Wals. 42. 7. 63. 229. 210. 1 N. Bl. 45. argo. 48. Long. 387. 71.  
1 Burr. 2.

A contract made by one of several partners, relating to the  
partnership business, binds the rest. Ch. 23. 7. And even af-  
ter the partnership is dissolved, a contract thus made, will bind  
all, unless public notice of the dissolution is previously given. Corp  
2649. 814. Salk. 292. Hild. 77. 147. 2 Bl. R. 998.

— Finis. —









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